Supreme Court, U.S.
FILED
942035 JUN 12 1995
OFFICE OF THE CLERK

NO. _____

In The
Supreme Court of The United States
October Term 1994

JOSEPH S. GREGORI, M.D., AND JOSEPH S. GREGORI, M.D., INC., Individually and as employer and administrator of Pension Plan and Trust,

Petitioners,

v.

DIANE A. SCHWARTZ,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a novel question of federal law which forms the basis for a conflict among the Circuits and with respect to which the Sixth Circuit has departed from previous decisions of this Court; namely, whether a monetary award of back pay and front pay for violations of Section 510 of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1140 can properly be characterized as equitable relief so as to be available under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B)?

PARTIES TO THE PROCEEDING

Respondent, Diane A. Schwartz brought this action against Petitioners Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc., Individually and as employer and as administrator of the Pension Plan and Trust, and against John J. Kuczek and Kuczek & Associates, Inc. for breaches of fiduciary duty and violations of ERISA § 510, 29 U.S.C. § 1140. After a trial to the court, the District Court entered judgment against all four Defendants, who then appealed. During the course of the Appeal to the United States Court of Appeals for the Sixth Circuit, John J. Kuczek and Kuczek & Associates settled with Respondent and dismissed their appeal.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOSEPH S. GREGORI, M.D. AND JOSEPH S. GREGORI, M.D., INC., Individually and as employer and administrator of Pension Plan and Trust, Petitioners,
V.
DIANE A, SCHWARTZ, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 31, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit declining to rehear this matter pursuant to Rule 40 of the Federal Rules of Appellate Procedure and further declining

to rehear the matter in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure is reprinted in the appendix hereto, p. A74, *infra*.

The opinion of the Court of Appeals for the Sixth Circuit holding that back pay and front pay constitute equitable relief available pursuant to ERISA § 502(a)(3)(B) for violations of ERISA § 510 is reported at 45 F.3d 1017, and is reprinted in the appendix hereto, p. A1, *infra*.

The memorandum decision of the United States District Court for the Northern District of Ohio (Battisti, D.J.) awarding Schwartz back pay and front pay pursuant to ERISA § 502(a)(3)(B) for violations of ERISA § 510 has not been reported. It is

reprinted in the appendix hereto, p. A28, *infra*.

JURISDICTION

On January 31, 1995, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision. On March 17, 1995, the Court of Appeals denied a timely Petition for Rehearing and Suggestion for Rehearing in Banc brought by Petitioners pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States on the grounds that the Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the Courts of Appeals for the Eighth, Eleventh and District of Columbia Circuits and previous decisions

of this Court. This case presents a novel question of federal law regarding the scope and nature of remedies available under ERISA which has not been, but should be, settled by this Court.

STATUTORY PROVISIONS INVOLVED

ERISA § 510, 29 U.S.C. § 1140 and ERISA § 502(a), 29 U.S.C. § 1132(a) are the pertinent statutory provisions involved in this case. Copies of both are attached hereto in Appendices IV and V at pages A76 and A77.

STATEMENT OF THE CASE

This action was initially brought by Respondent Diane Schwartz (hereinafter "Schwartz"), in the United States District Court for the Northern District of Ohio on November 10, 1988, against Petitioner Joseph S. Gregori, M.D., Inc.,

seeking damages for alleged violations of fiduciary duty on the part of Joseph S. Gregori, M.D., Inc. in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (hereinafter "ERISA"). A series of amended complaints brought in new parties and new causes of action. In her final Amended Complaint, filed on September 14, 1989, Schwartz sought an award of damages against Joseph S. Gregori, M.D., Inc. and Joseph S. Gregori, M.D. (hereinafter collectively referred to as "Gregori") and John J. Kuczek and Kuczek & Associates (hereinafter collectively referred to as "Kuczek") on the basis of claimed breaches of fiduciary duty under ERISA and the allegedly unlawful discharge of Schwartz in violation of ERISA § 510.

The District Court had subject matter jurisdiction over the case pursuant to ERISA § 502(e). This matter was tried to Judge Frank J. Battisti on May 6, 1992 through May 11, 1992 in Youngstown, Ohio. The District Court entered Judgment in this case on July 31, 1993 as follows: Against all Defendants jointly and severally on the breach of fiduciary duty claim for the loss suffered by the Plan in the amount of $19,728.15; for prejudgment interest on that loss in the amount of $10,077.00; and attorneys' fees; and against Gregori on the ERISA § 510 wrongful discharge claim for back pay in the amount of $59,764.00 and front pay in the amount of $42,443.00. (A72-A73).

Gregori and Kuczek appealed to the United States Court of Appeals for the

Sixth Circuit from the judgment of the District Court as a matter of right pursuant to 28 U.S.C. § 1291. Schwartz also filed a cross-appeal. During the pendency of the appeal, the issues relating to the loss suffered by the Plan, prejudgment interest and attorneys fees were settled. As a result of this settlement, Kuczek's appeal and Schwartz's cross-appeal were dismissed by stipulation of the parties, and the issues to be considered by the Court of Appeals were narrowed considerably. The only remaining issues before the panel were whether Gregori had violated ERISA § 510 in discharging Schwartz, and whether back pay and front pay could be characterized as "other equitable relief" for purposes of determining whether the

remedies were available to Schwartz pursuant to ERISA § 502(a)(3)(B).

The Court of Appeals, in its January 31, 1995 opinion, (A17), declined to disturb the District Court's factual determination that Schwartz was discharged in retaliation for her instituting this action. The Court of Appeals went on to affirm the District Court's award of back pay and front pay, mischaracterizing the same as restitution available as "other equitable relief" pursuant to ERISA § 502(a)(3)(B).

In characterizing the back pay awarded to Schwartz as an equitable remedy in the form of restitution, the Court of Appeals expressly rejected the recent holding of the United States Court of Appeals for the Eleventh Circuit in Waldrop v. Southern Company Services,

Inc., 24 F.3d 152 (11th Cir. 1994), that back pay in the context of a discriminatory discharge cannot be characterized as the equitable remedy of restitution, but rather, constitutes compensatory money damages. (A23, n. 5).

This mischaracterization of back pay as restitution also places the Sixth Circuit's holding in this case in direct conflict with Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C.Cir. 1995) and Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir.) amended en banc, 657 F.2d 962, cert. denied 454 U.S. 1064 (1981). Moreover, the Sixth Circuit's holding is inconsistent with this Court's prior ruling that back pay of this type is not restitutionary, but rather, constitutes legal relief in the form of money damages. Chauffers,

Teamsters and Helpers Union Local No. 391 v. Terry, 494 U.S. 558 (1990).

With respect to front pay, the Court of Appeals held that it had previously determined front pay to be an equitable remedy awarded when reinstatement is not appropriate. (A24-A25). The Court of Appeals failed, however, to address this Court's admonition in Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993) that the phrase "other equitable relief" in ERISA § 502(a)(3)(B) is limited to those remedies which have traditionally been considered equitable, and does not include compensatory money damages. Id. at 2069.

This Court in Terry, and the Eighth, Eleventh and District of Columbia Circuits in Setser, Waldrop and Crocker, have all held that back pay under various

other federal statutes represents legal relief. The important federal question of whether back pay and front pay can be characterized as "other equitable relief" for purposes of ERISA § 502(a)(3)(B), in light of this Court's recent holdings in Terry and Mertens, is a novel question which has not been addressed by this Court or any other Circuit Court of Appeals. The Sixth Circuit's decision in this case presents a developing conflict among the Circuits which should be settled by this Court at this time.

On February 14, 1995, Gregori filed a Petition for Rehearing and Suggestion for Rehearing in Banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure. On March 17, 1995, the Petition for Rehearing and the

Suggestion for Rehearing in Banc were both denied. (A74).

REASONS FOR GRANTING WRIT

I. THE SIXTH CIRCUIT'S DETERMINATION THAT BACK PAY AND FRONT PAY ARE EQUITABLE REMEDIES RATHER THAN COMPENSATORY MONETARY DAMAGES PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The question presented in this case deals with an interpretation of a very important aspect of federal law; namely, the scope and nature of the remedies available under ERISA. The remedies available to persons aggrieved by violations of ERISA § 510 are set forth in ERISA § 502(a)(3)(B)(i), which allows participants in a pension plan "to obtain other appropriate equitable relief" to redress applicable violations of ERISA. In Mertens, this Court held that

compensatory monetary damages are not available as "other appropriate equitable relief" under ERISA § 502(a)(3)(B). In order to circumvent the edict of Mertens, the Court of Appeals in this case mischaracterized the back pay and front pay awarded to Schwartz as equitable remedies rather than compensatory monetary damages.

This mischaracterization by the Sixth Circuit has resulted in a holding on this important question of federal law which conflicts with this Court's prior decisions in Mertens, Terry and Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960). This Court must address this novel question of federal law in order to avoid placing litigants in the untenable position of attempting to reconcile the Sixth Circuit's holding in this case with

this Court's holdings in Mertens, Terry and Mitchell.

A. THE AWARD OF BACK PAY TO SCHWARTZ IS AN AWARD OF COMPENSATORY MONEY DAMAGES WHICH IS NOT AVAILABLE UNDER ERISA § 502(a)(3)(B).

The Sixth Circuit characterized the award of back pay to Schwartz as restitution, and, thus, "other appropriate equitable relief." This determination by the Court of Appeals, however, conflicts with this Court's decision in Terry, where it was held that back pay is legal rather than equitable relief.

In Terry, this Court was confronted with the issue of whether the plaintiff was entitled to a jury trial on his claim for back pay for a violation of § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. This

determination hinged on whether the relief sought was equitable or legal. In Terry, this Court wisely concluded that the only remedy being sought was a request for compensatory money damages representing back pay and benefits. Because an action for money damages was generally considered to be "the traditional form of relief offered in the courts of law," this Court held "that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable [and] we find that the remedy sought by respondents is legal." Terry, 494 U.S. at 570.

The Court then went on to hold that it has "characterized damages as equitable where they are restitutionary,

such as in 'action[s] for disgorgement of improper profits.'" (Emphasis added). Terry, 494 U.S. at 570 quoting Tull v. United States, 481 U.S. 412, 424 (1987).[1] This Court, examining the particular damages sought by Terry, concluded as follows:

> The back pay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from [the employer] had the Union processed the employees' grievances properly. *Such relief is not restitutionary*.

(Emphasis added). Terry, 494 U.S. at 570-571. Likewise, in this case the back

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[1]Although it was not raised by Schwartz below, nor addressed by the Court of Appeals, Terry held that monetary awards incidental to or intertwined with injunctive relief may be equitable. Terry, 494 U.S. at 571. In this particular case, as in Terry, the only relief awarded to Schwartz was money damages in the form of back pay and front pay. As such, in the absence of injunctive relief, this second basis for determining that an award of money damages can constitute equitable relief is clearly inapplicable to the case at bar.

pay awarded to Schwartz does not represent money earned by Schwartz and wrongfully withheld by Gregori, but, rather, represents wages Schwartz would have received had she not been terminated. As a result, the award of back pay to Schwartz cannot be characterized as restitutionary pursuant to this Court's holding in Terry.

The determination of whether back pay represents legal or equitable relief is a very important question of federal law. With respect to many statutes, such as those addressed in Terry, Setser, Waldrop and Crocker, the characterization of back pay dictates whether a jury will be available, which, although important, does not necessarily affect the ultimate outcome of the case. The context in which the issue is presented here,

however, is critical to the outcome of the cases brought under ERISA, as it ultimately defines the rights of parties to the litigation. For this reason, it is essential that the analysis courts apply to this important question of federal law is consistent, so that litigants can undertake an intelligent and fully informed analysis in deciding whether to pursue such litigation.

Despite the important nature of this issue, the Sixth Circuit in this case departed from this Court's learned analysis of the issue contained in Terry. Instead, the Court of Appeals attempted to distinguish Terry based on the grounds that the back pay in this case was coming directly from the employer, rather than

from a third-party.[2] The Court of Appeals concluded that this difference permitted the back pay award to Schwartz to be considered restitution.

In attempting to make this inaccurate and meaningless distinction, the Court of Appeals relied on Mitchell, which was cited by Terry as an example of when back pay can be restitutionary in nature. The back pay which the Mitchell Court held was restitutionary, however, is clearly distinguishable from the back pay awarded here.

Mitchell dealt with violations of the Fair Labor Standards Act of 1938. The Secretary of Labor brought an action

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[2]This conclusion renders the Sixth Circuit's decision in conflict with at least two Circuit Courts of Appeals which have rejected this reasoning and concluded that this Court's holding in Terry renders back pay legal rather than equitable relief even when it comes directly from the employer rather than from a third-party. See Crocker and Waldrop.

on behalf of several employees who had made claims for unpaid minimum wage or overtime compensation. The employees were discharged as a result of their claims, and the issue became whether the employees were entitled to back pay for the period they did not work due to their unlawful discharge. In its analysis, this Court recognized that there were two types of back pay being sought, back pay for unpaid minimum wage or overtime compensation during the time the employees worked, and back pay for the period of time after the complainants were unlawfully discharged.

The Mitchell Court clearly held that the first type of back pay was "restitution of partial deficiencies in wages due for past work." Mitchell, 361 U.S. at 293. However, nowhere in

Mitchell did this Court hold that the second type of back pay constituted restitution. Rather, the Court held that it was within the trial court's "equitable jurisdiction" to grant such relief under the Fair Labor Standards Act. Mitchell, 361 U.S. at 295-296.

This distinction between the types of back pay recognized by this Court in Mitchell is critical to an analysis of the issues in this case, since this Court has specifically held that nonrestitutionary money damages are not within the Court's equitable jurisdiction to award under ERISA § 502(a)(3)(B). See Mertens, 113 S.Ct. at 2068.

In Mitchell, the Supreme Court had no reason to draw the distinction between legal and equitable relief, as the Court held that restitutionary compensation,

for past work performed, and compensatory money damages in the form of back pay, for the period of time subsequent to the unlawful discharge, were available under the Fair Labor Standards Act. The Supreme Court, however, has reached the opposite conclusion with respect to ERISA, holding that only restitutionary compensation would be available under ERISA § 502(a)(3)(B). See Mertens, 113 S.Ct. at 2068.

In Mitchell, this Court held that the District Courts have equitable jurisdiction to award such relief as may be necessary under the circumstances, "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity. . . ." Mitchell, 361 U.S. at 291 citing Porter v. Warner Co., 328 U.S.

395, 397-398 (1946). While in Mitchell, this Court concluded that the statute in question placed no limitations on the Court's equitable jurisdiction, in Mertens, this Court reached the opposite conclusion with respect to ERISA. After reviewing ERISA § 502 and extensively examining the traditional "equitable" powers of the courts, this Court declared that monetary awards are "the classic form of legal relief" which are not within a court's equitable jurisdiction to award under ERISA § 502(a)(3)(B). Mertens, 113 S.Ct. at 2068.

The distinction between characterizing an award as "equitable relief" and determining that certain relief is within the Court's "equitable jurisdiction" is critical, in light of the following passage from Mertens:

> [L]imiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief not at all. We will not read the statute to render the modifier superfluous. . . . The authority of courts to develop a "federal common law" under ERISA, . . .is not the authority to revise the text of the statute.

Mertens, 113 S.Ct. at 2069-2070. It is clear from Mertens that any remedy awarded under ERISA § 502(a)(3)(B) must itself be "equitable relief" and not merely any relief available in equity.

In reviewing the nature of restitution, it is easy to see why the first type of back pay considered in Mitchell would be restitutionary, while the second would not be. Restitution traditionally encompasses the notion of retrieving a benefit which was

erroneously given to or taken by another (unjust enrichment) or being compensated for work done or services provided (quantum meruit).[3] It has been written that:

> Unjust enrichment is usually a prerequisite for the enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution. It is said to be fundamental that for a person to be entitled to restitution, he must show not only that there was unjust enrichment, but also that the person sought to be charged had wrongfully

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[3]See Douglas Laycock, The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1279 (1989), where it was observed as follows:

> "Restitution" means recovery based on and measured by unjust enrichment. It also means restoration in kind of a specific thing.
>
> * * *
>
> [R]estitution is the body of law that grants recovery on the basis of unjust enrichment. It follows from the focus on unjust enrichment that restitution measures recovery by defendant's gain rather than plaintiff's loss.

[Footnotes omitted].

> secured a benefit, or had passively received one which it would be unconscionable for him to retain.

66 Am. Jur. 2d, Restitution and Implied Contracts § 4. Restitution contemplates that the person sought to be held liable for restitution possesses some benefit which should properly be disgorged, a characteristic which is conspicuously absent here.

In Mitchell, back pay for unpaid minimum wages or overtime was defined by this Court as restitution because the employees actually performed the work, but were not fully compensated for their efforts in accordance with the minimum wage and overtime laws. In that situation, the employer would have been unjustly enriched by the work done by the undercompensated employees, and restitution would, therefore, be

available. In the case of a wrongful discharge, however, the employer does not receive any benefit from the employee after the discharge. In this latter situation, the damages are not restitutionary, but rather, are compensatory money damages for the loss of the plaintiff's job.

The Sixth Circuit's holding in this case has decided the important federal question of what remedies Congress intended to be available under ERISA in a way which conflicts with this Court's previous decisions in Mertens, Terry and Mitchell. This Court, in Mertens, made it clear that compensatory money damages are not available under ERISA § 502(a)(3)(B). Furthermore, the Sixth Circuit's mischaracterization of the back pay award as restitution is clearly

inconsistent with Terry, where this Court held back pay for periods of time during which the claimant was not working cannot be characterized as restitution.[4] Moreover, unlike the statute in Mitchell, this Court in Mertens held that ERISA

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[4]The only context in which back pay has ever been characterized as equitable relief in a wrongful discharge context has been in Title VII cases, which this Court in Terry distinguished as follows:

> Congress specifically characterized back pay under Title VII as a form of "equitable relief." 42 U.S.C. § 2000e-5(g) (1982 ed) ("[T]he court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate"). . . . Congress made no similar pronouncement regarding the duty of fair representation.

Terry, 494 U.S. at 572. In drafting ERISA §§ 502 and 510 of ERISA Congress failed to make a similar pronouncement regarding back pay in ERISA cases. Congress easily could have enacted language similar to that used in 42 U.S.C. § 2000e(5)(g) (1982 ed) and provided for "back pay and other appropriate equitable relief" in ERISA § 502(a)(3)(B), but chose not to. Absent a specific characterization by Congress anywhere in ERISA that back pay for a wrongful discharge should be treated as equitable relief, such relief must be considered legal relief.

specifically restricts a court's equity jurisdiction to traditionally equitable remedies. For these reasons, the decision of the Sixth Circuit, upholding the back pay awarded to Schwartz pursuant to ERISA § 502(a)(3)(B), is in conflict with this Court's decisions in Mertens, Terry and Mitchell.

B. THE AWARD OF FRONT PAY TO SCHWARTZ IS AN AWARD OF COMPENSATORY MONEY DAMAGES WHICH IS NOT AVAILABLE UNDER ERISA § 502(a)(3)(B).

In affirming the District Court's award of front pay, the Court of Appeals stated that in the past it had consistently held that front pay was an equitable remedy. (A24-A25).[5] This

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[5]The Sixth Circuit relied on Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994), dealing with Title VII, 42 U.S.C. § 2000e(g), and Roush v. KFC Nat'l Management Co., 10 F.3d 392, 398 (6th Cir. 1993) cert. denied, 115 S.Ct. 56 (1994), dealing with the Age

conclusion, however, is inconsistent with this Court's holdings in Mertens and Terry, where it was recognized that such money damages constitute legal rather than equitable relief. Indeed, it is difficult to envision front pay being characterized as anything but an award of compensatory money damages, as it denotes pay for a period of time that will not be worked.[6] In this regard, front and back pay are one in the same in the present case. The labels are superfluous, as both have been awarded for periods during

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Discrimination in Employment Act, 29 U.S.C. § 626(c)(1).

[6]See Beesley v. Hartford Fire Ins. Co., 723 F.Supp. 635 (N.D.Ala. 1989) where the Court held as follows:

> [I]t is just as unrealistic and disingenuous to call "front pay" an equitable remedy, as it is to call "back pay" an equitable remedy. The loss of future earnings constitutes damages of the kind today regularly and routinely submitted to a jury for resolution in other kinds of cases.

Id. at 647.

which no work has been or will be performed.

The front pay awarded in Shore and Roush can only be characterized as a legal remedy to be awarded where a court has equitable jurisdiction to do so.[7] Such a characterization would permit a compensatory award of front pay in Title VII and ADEA cases, without putting the holdings of Shore and Roush in conflict with Mertens and Terry. However, due to the limitations ERISA § 502(a)(3)(B) places on a court's equitable power to grant legal relief, front pay is not available in ERISA cases. This puts the present matter in direct conflict with the holdings in Mertens and Terry.

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[7]Because Title VII and the ADEA do not place any limitations on a Court's equitable jurisdiction, it was not necessary for the Court of Appeals in Shore or Roush to make the distinction between equitable and legal relief.

II. THE SIXTH CIRCUIT'S DETERMINATION THAT BACK PAY IN A WRONGFUL DISCHARGE OR FAILURE TO HIRE CONTEXT IS AN EQUITABLE REMEDY RATHER THAN COMPENSATORY MONETARY DAMAGES IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH CIRCUIT, ELEVENTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT.

The Courts in Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C.Cir. 1995), Waldrop v. Southern Company Services, Inc., 24 F.3d 152 (11th Cir. 1994) and Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir.) amended en banc, 657 F.2d 962, cert. denied 454 U.S. 1064 (1981), have all thoroughly reviewed the question of whether back pay in the context of a wrongful discharge or a failure to hire can be characterized as the equitable remedy of restitution, and

all three have rejected that notion.[8] The holdings in Crocker, Waldrop and Setser are clearly in conflict with the Sixth Circuit's holding that the award of back pay to Schwartz constitutes equitable relief in the form of restitution. The division between the Sixth Circuit and the Circuits in which Crocker, Waldrop and Setser were decided represents a developing conflict among the circuits with respect to a very important question of federal law which has not been, but should be, settled by

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[8]All three of these decisions deal with the issue in the context of whether a jury trial is available. While no other Circuit has addressed the issue in the context of an action brought pursuant to ERISA § 510, the basic elements of the cases are the same. In all of these cases, the claimants have been wrongfully denied employment, and are seeking to recover damages for the period during which they were not actually employed. The only difference between the cases is the particular statute which made the denial of employment unlawful. This difference has no impact on the underlying analysis of whether back pay can be characterized as the equitable remedy of restitution.

this Court. All four decisions deal with the question of whether back pay in the context of a discriminatory discharge or unlawful failure to hire constitutes equitable restitution or legal compensatory damages.

All of the federal statutes involved in these four cases are silent on the issue of whether back pay is an equitable or legal remedy. Crocker, Waldrop and Setser have held that back pay for violations of the Airline Deregulation Act of 1978, the Rehabilitation Act of 1973 and 42 U.S.C. § 1981 is properly characterized as legal relief, while the Sixth Circuit's decision in this case held that back pay awarded for a violation of ERISA § 510 constituted equitable relief.

The unacceptable result of these conflicting decisions is that back pay for violations of different federal statutes will be characterized as legal or equitable relief depending on the federal statute being interpreted. This is particularly untenable to prospective litigants, since the decisions in Crocker, Waldrop and Setser are not in any way based on the language of the various federal statutes. It is imperative for the uniform operation of federal law that the concept of back pay as legal or equitable relief be consistently interpreted among all of the Circuits.

The determination of back pay as equitable or legal relief impacts not only on the availability of the remedy itself, as is the case in ERISA, but the

availability of a trial by jury, as was the case in Crocker, Waldrop and Setser. The consistent application of the Sixth Circuit's holding in this case to the Airline Deregulation Act of 1978, the Rehabilitation Act of 1973 and 42 U.S.C. § 1981 would presumably result in litigants in the Sixth Circuit being denied jury trials in cases brought under these federal laws. Moreover, ERISA litigants in the Eighth, Eleventh and District of Columbia Circuits would presumably not be entitled to back pay for violations of ERISA § 510.

As the situation currently exists, litigants and Courts are placed in the undesirable position of attempting to analyze these issues in light of the irreconcilable holdings of these four cases. As the Courts in the Eighth,

Eleventh and District of Columbia Circuits apply the holdings in Crocker, Waldrop and Setser to ERISA, and the Sixth Circuit applies its holding in this case to other federal employment statutes, the waters can only become more murky. Add to this the decisions from other Circuits which will inevitably attempt to reconcile the holdings of these cases as they are faced with the various federal questions which deal with the characterization of back pay as legal or equitable relief, and a real quagmire becomes apparent. Inevitably, the distinctions will only grow more meaningless, and the overall understanding of this area of the law more confusing. By addressing this developing conflict at this time, this Court can avoid the inevitable conflicts

posed by the decisions of these four Circuits.

The most recent of the above-cited decisions is Crocker, which involved a pilot who was not hired in violation of the Employee Protection Program of the Airline Deregulation Act of 1978 § 43, 49 U.S.C. §§ 42101 through 42106. The issue before the District of Columbia Circuit was whether the back pay Crocker sought was a legal remedy which entitled him to a jury trial.

The Court began its analysis with the following observations regarding the effect of this Court's holdings in Mertens and Terry:

> The Supreme Court has held that as a general rule awards of pecuniary relief such as back pay are legal. See Mertens v. Hewitt Assocs., 113 S.Ct. 2063, 2068 (1993); Terry, 494 U.S. at 570.

Crocker, 49 F.3d at 746. This conclusion alone puts the Crocker decision in conflict with the Sixth Circuit, which held in this case that this Court's holdings in Mertens and Terry required that back pay be characterized as an equitable remedy.

The Court in Crocker then went on to address Piedmont Airline's contention that back pay be considered restitution, and concluded that absent unjust enrichment or "in kind" restoration of property, back pay could not be characterized as restitution. Crocker, 49 F.3d at 747. Since back pay is clearly designed to compensate an employee for his or her loss, rather than divesting the employer of some type of improper profits, it cannot be properly characterized as restitutionary relief.

The Eleventh Circuit in Waldrop undertook a similarly detailed review of the law of restitution, and also concluded that back pay in the context of a wrongful discharge cannot properly be characterized as restitution because back pay is based on the employee's loss, rather than the employer's gain.[9] In analyzing this issue, the Court in Waldrop held that for this reason, back pay has always been considered legal relief. Waldrop, 24 F.3d at 158-159. Likewise, in this case, because the back pay award to Schwartz did not divest Gregori of any benefit he received from Schwartz, but, rather, represented compensation for the value of her lost

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[9]Waldrop dealt with a wrongful discharge in violation of the Rehabilitation Act of 1973.

job, it could not properly be considered restitution.

Finally, in Setser[10], the Court of Appeals for the Eighth Circuit observed some courts had improperly attempted to liken backpay to a form of restitution in order to characterize backpay as equitable, but held that such a characterization misconceived the concept of restitution. Setser, 638 F.2d at 1141-1142. In the case at hand, since Schwartz no longer performed any services for Gregori after she was discharged, she did not confer any benefit on Gregori, and thus any award of back pay cannot be characterized as restitution.

It is clear from even a cursory review of Crocker, Waldrop and Setser,

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[10]Setser dealt with a violation of 42 U.S.C. § 1981.

that the Sixth Circuit's holding in this case is in direct conflict with the holdings of the Eighth Circuit, the Eleventh Circuit and the District of Columbia Circuit on the issue of whether back pay can be characterized as restitution.[11] Indeed, the Court of Appeals in this case acknowledged the conflict, observing that the Eleventh Circuit in Waldrop had categorized back pay as a legal remedy. (A23, n. 5).

Although Crocker, Waldrop and Setser did not involve actions brought for

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[11]While the precise issue before the Sixth Circuit was whether back pay was available under ERISA § 502(a)(3)(B), it is clear that the basis for the Sixth Circuit's decision that ERISA § 502(a)(3)(B) allowed back pay to be awarded for violations of ERISA § 510, was the Sixth Circuit's conclusion that the back pay awarded to Schwartz was restitution. Had the Sixth Circuit not reached this conclusion, then the award of back pay would have to have been considered compensatory money damages, and, thus, would not have been available pursuant to this Court's holding in Mertens.

violations of ERISA § 510, it is clear that the holdings in these three cases, when applied to ERISA § 502(a)(3)(B) for violations of ERISA § 510, will prohibit awards of back pay to plaintiffs. Thus, the availability of back pay as an award for a violation of ERISA § 510 will depend on the Circuit in which the action is brought. Likewise, application of the decision in this case to the Airline Deregulation Act of 1978, the Rehabilitation Act of 1973, 42 U.S.C. § 1981 and other federal employment statutes, will result in the unavailability of jury trials in the Sixth Circuit. Such a result is untenable, and is precisely the type of conflict this Court must rectify.

This very notion was expressed by the three Justices who dissented from

this Court's denial of certiorari in Setser:

> It may be unfortunate in light of the expanding size of our docket, but it remains the case that this Court is the only body capable of resolving conflicts between the various lower courts, both federal and state. Our obligation to resolve these conflicts is just as pressing as is the need for a uniform rule of law. In my view this is a very pressing need, and is particularly so when the conflict involves those elements that define the character of the judicial process itself. In this respect, the right to a jury trial is fundamental. It is not a tolerable rule of law that one's right to a jury trial depends upon the geographical location of the federal district court within which one files a complaint. This is precisely what is involved in this case.

Setser, 454 U.S. at 1064-1065 (White dissenting). This argument is equally compelling here, where without Supreme Court resolution of this issue, the very

nature of the remedies available under federal law will vary with the rule of the Circuit. It is inconceivable that in the Eighth Circuit, Eleventh Circuit or the District of Columbia Circuit, a defendant such as Gregori would be immune from an award of back pay under the federal ERISA statute, while in the Sixth Circuit he could be compelled to pay such damages under the same federal law. Such a result clearly must be prevented by this Court.

III. THE COURT OF APPEALS DECISION IN THIS CASE HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL INTERPRETATION GIVEN TO THE REMEDIES AVAILABLE UNDER ERISA AS TO CALL FOR THE EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The Sixth Circuit's resolution of the important question of federal law presented by this case is in conflict with the scope of remedies Congress

intended to be available for violations of ERISA § 510. The precise issue presented for review in this case, whether back pay and front pay are available under ERISA § 502(a)(3)(B) for violations of ERISA § 510, is one of first impression, and has not been previously addressed by this Court or any Circuit Court of Appeals. As demonstrated above, the Sixth Circuit's resolution of this issue is irreconcilable with the previous decisions of this Court and three Circuit Courts of Appeal.

This Court in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985), concluded that Congress had extensively and painstakingly structured a complex, complete remedies section in drafting ERISA. This Court concluded

that the effort Congress clearly put into the development of the remedies provisions in ERISA provides a strong indication that Congress knew which remedies it was including and excluding. Given the obvious attention Congress has given to this aspect of ERISA, this Court wisely concluded that it would be inappropriate to add remedies not expressly provided by Congress. As recognized by this Court in both Mertens and Russell, Congress intended a relatively limited scope of recovery when it used the phrase "other appropriate equitable relief" in ERISA §§ 502(a)(2) and (3).

This Court in Russell correctly noted that an earlier version of ERISA specifically provided for both legal and equitable relief, but that in the final

version Congress removed the reference to legal relief, and referred only to "other appropriate equitable relief." Russell, 473 U.S. at 145-46, n. 14. Thus, Congress was aware that it was placing a considerable limit on the type of relief which would be available under ERISA § 502(a). This is compelling evidence that ERISA's reference to only equitable relief is not mere inadvertence. The Sixth Circuit has ignored this clear legislative intent by permitting Schwartz to recover back pay, a remedy almost universally considered legal relief.[12]

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[12]The two exceptions to this general rule were noted above. Specifically, the only occasions where back pay has been characterized as legal relief has been in Title VII cases, where Congress expressly defined back pay as equitable relief, and in Mitchell, where the back pay was clearly restitution of wages for time which the plaintiff's worked, but were not adequately compensated according to law. It is clear that neither of those situations is present in this case.

The legislative goal in enacting ERISA § 510 was discussed in West v. Butler, 621 F.2d 240 (6th Cir. 1980) where it was concluded that the purpose of ERISA § 510 was to protect employees' rights to pension benefits, not necessarily the employees' rights to employment. Id. at 245 citing 119 Cong.Rec. 30374, reprinted in Legislative History at 1774-75 and 119 Cong.Rec. 30044, reprinted in Legislative History at 1641. Thus, unlike other statutes dealing with discriminatory discharge, ERISA § 510 was not designed to protect the employment relationship per se, but rather, was designed to protect the pension rights which resulted from that employment relationship.

This Court has previously limited the scope of remedies available for

violations of the provisions of ERISA based on the observation that the primary objective of ERISA was to protect pension benefits. In Russell, this Court was faced with a beneficiary seeking individual relief for a breach of fiduciary duty under ERISA § 409. This Court held, however, that ERISA limited the remedy for breaches of fiduciary duty to recoveries by the pension plan, not by individual beneficiaries. Russell, 473 U.S. at 144. This Court reached that decision based in part on its observation that a "fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets." Russell, 473 U.S. at 142.

With respect to the provisions of ERISA involved in this case, Congress

determined that the protection of pension benefits could be adequately achieved using only the equitable remedies provided for in ERISA § 510. Thus, for example, the equitable remedy of declaring pension rights to be vested although the employee was terminated prior to such vesting, would cure the evil Congress was attempting to remedy.[13]

In short, back pay and front pay are not necessary remedies to effectuate the legislative goals embodied in ERISA § 510. As observed by this Court in Mertens, 113 S.Ct. at 2072:

> There is . . . a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of

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[13]In this case, Schwartz's pension benefits were fully vested, and the plan was terminated prior to the time she was discharged. As a result, Schwartz was arguably not within the class of individuals ERISA § 510 was enacted to protect.

> containing pension costs. . . . We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.

By expanding the scope of remedies available under ERISA § 502(a), the Sixth Circuit is attempting to adjust the balance achieved by Congress. It is, therefore, incumbent upon this Court to restore that balance.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 31, 1995.

Respectfully submitted,

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APPENDIX I

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0040P (6th Cir.)

File Name: 95a0040p.06

No. 93-3964

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Diane A. Schwartz, Plaintiff-Appellee,	)	
v.	)	On Appeal from
Jospeh S. Gregori, M.D.; Joseph S. Gregori, M.D., Inc., Individually and as Employer and Administration of Pension Plan and Trust, Defendants-Appellants,	)	the United States District Court for the Northern District of Ohio
and	)	
John J. Kuczek and Kuczek & Associates, Inc., Defendants.	)	

Decided and Filed January 31, 1995

Before: MILBURN and SUHRHEINRICH, Circuit Judges; and JOINER, District Judge*.

CHARLES W. JOINER, District Judge. Defendants Joseph S. Gregori and Joseph S. Gregori, M.D., Inc., appeal the judgment in favor of plaintiff Diane Schwartz for breach of fiduciary duty and retaliatory discharge under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq. The district court awarded Schwartz damages to compensate her for the financial losses caused by defendants' breach of fiduciary duty, together with prejudgment interest; back pay and front pay for retaliatory discharge; and attorney fees. The Gregori defendants challenge their

liability for retaliatory discharge and the award of back pay and front pay. We affirm.

I.

Joseph Gregori, a physician, and Diane Schwartz, a licensed x-ray technician, met through their employment in 1971. In 1975, Gregori started his own practice, formed Joseph S. Gregori, M.D., Inc., and hired Schwartz as his office manager and x-ray technician.

Defendant John Kuczek is a financial planner and insurance salesman, conducting business through Kuczek & Associates, Inc. Kuczek and Gregori are friends, and Kuczek performed financial planning services for Gregori. At Kuczek's suggestion, Gregori formed the Joseph S. Gregori, M.D., Inc. Employer's Pension Plan and Trust Agreement (the

"plan") in 1975. Gregori individually served as trustee of the plan, and Gregori, Inc. served as administrator. Gregori, Schwartz and others were participants in the plan.

Gregori had no investment experience, and relied on Kuczek to make decisions for the plan. In 1983, Kuczek learned of a commodities investor, David Meek, whose funds supposedly were earning as much as 30 percent. Kuczek recommended to Gregori that the plan invest in Meek's funds. Gregori followed Kuczek's advice, investing $50,000 of plan assets in September 1983, and an additional $108,500 in December 1983. The latter investment was made following Kuczek's "due diligence" visit to Meek's office in Florida, where he learned that Meek's business had been in operation for

only nine months.[1] Following the December investment, the amount invested in Meek's funds represented 45.6 percent of the total plan assets.

Meek issued weekly statements for a period of time which indicated that the funds were performing well. Over the next year, Gregori and Kuczek received two notices disclosing that Meek was a defendant in an action brought by the Commodities Futures Trading Commission (CFTC), and that an injunction had been issued requiring Meek to allow the CFTC to have access to the books and records of one of his funds. On both occasions, Kuczek called Meek and was assured that

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[1]Kuczek was also aware that Meek was 29 years old, had only two weeks of college education, and had worked for five different employers between 1977 and 1981. Kuczek did not contact any of Meek's former employers prior to recommending the investment to Gregori.

the problem was an inadvertent one which was being remedied. Kuczek did not confirm Meek's report with the CFTC or recommend that the plan's assets be withdrawn.

Meek stopped issuing weekly statements in July 1985, and shortly thereafter the CFTC froze all of his accounts. In 1987, Gregori and Kuczek learned that Meek had embezzled all of the invested funds, and that the weekly reports were fictitious. The parties stipulated that the total loss to the plan was $288,991.09, and that Schwartz's share of the loss was $19,728.15. Kuczek offered to make restitution to the plan for the loss, but Gregori refused the offer and "forgave" Kuczek because he had not caused the loss intentionally. The plan was terminated on March 31, 1988,

and Schwartz received a lump sum payment representing her share of the plan assets then in existence. This payment did not compensate Schwartz for the losses attributable to the Meek investment.

Schwartz and Gregori had several discussions during this time period regarding the plan's losses. Gregori offered to repay the lost funds to Schwartz in the form of bonuses over a three-year period, but Schwartz refused the offer because the bonuses would have been taxable as income in the years they were received, and could not have been invested in a qualified retirement plan. Through counsel, Schwartz demanded that Gregori reimburse her for the loss and threatened legal action. Gregori responded by telling Schwartz that she would be out of a job if she sued him.

Gregori also threatened to force Schwartz to quit by reducing her hours.

Schwartz filed suit on November 10, 1988, and effected service on November 14. Within days, Gregori advertised for an x-ray technician. On November 22, Gregori sent his attorney a draft letter terminating Schwartz, and asked the attorney to make necessary alterations or clarifications. Gregori terminated Schwartz on December 9, telling her that he planned to scale back his practice, implement computerization, and involve his wife in the administration of the office.

Schwartz's original complaint asserted a breach of fiduciary duty claim against Gregori, Inc. only. Through amendment, Schwartz added a similar claim against the Kuczek defendants and Gregori

individually, and added a claim against the Gregori defendants for illegal discharge, seeking back pay, reinstatement or front pay in lieu thereof, and damages for emotional distress.

The case was tried to the court. Extensive testimony was introduced on the breach of fiduciary duty claim, on which the district court found all four defendants jointly and severally liable, awarding Schwartz $19,728.15 together with prejudgment interest. With respect to the retaliatory discharge claim, Schwartz established that the reasons Gregori had given to justify her termination had not materialized; i.e., Gregori did not scale down his practice, did not computerize his office for three years, and involved his wife in the

office for only a short time following Schwartz's discharge. Gregori testified at trial to additional reasons for Schwartz's termination, alleging incompetence, failure to perform duties, and failure to communicate and show initiative. The district court found that all of stated reasons were pretextual, and that Gregori's real reason for discharging Schwartz was her lawsuit to enforce her rights under the plan. Accordingly, the court found that the Gregori defendants retaliated against Schwartz in violation of ERISA. The court denied Schwartz emotional distress damages, and found that reinstatement was not a feasible remedy in light of the hostility between the parties. The court awarded back pay of $59,764, and front pay of $42,443. Finally, the court

awarded Schwartz attorney fees of $33,253 for services rendered through the date of judgment.

II.

The scope of this appeal has been narrowed considerably since it was first filed,[2] and the remaining issues concern

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[2]Pursuant to the parties' stipulation, this court dismissed the Kuczek defendants' appeal and Schwartz's cross-appeal. The Gregori defendants report that Schwartz's settlement with the Kuczek defendants has resolved the damage award for breach of fiduciary duty as well as district court's award of attorney fees. The Gregori defendants expressly have abandoned their challenge to the court's determination of the amount of the plan loss attributable to Schwartz and the award of prejudgment interest. They suggest that their challenges to the court's findings of breach of fiduciary duty and causation remain viable for preserving their right to seek attorney fees on appeal. The Gregori defendants have made no request for fees to date. We note, moreover, that the Gregori defendants' liability for breach of fiduciary duty and the resulting damage to Schwartz was clearly established by Gregori's refusal, contrary to the best interests of the plan participants, of Kuczek's offer to reimburse the plan. We find no clear error in the court's findings of fact on this issue, and reject Gregori's claim, unsubstantiated by competent evidence or legal authority, that the IRS would not permit a fiduciary to reimburse the plan for

Schwartz's claim of retaliatory discharge. An employee's rights under ERISA are set forth in § 510, 29 U.S.C. § 1140:

> It shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline, or discriminate against a *participant* or beneficiary *for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter*, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or

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losses caused by his investments. 29 U.S.C. § 1109(a) (obligation of fiduciary to reimburse plan for losses caused by breach of fiduciary duty).

> proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. *The provisions of section 1132 of this title shall be applicable in the enforcement of this section.*

(Emphasis added.) The provision governing the relief available under ERISA is § 502, 29 U.S.C. § 1132(a), which provides in pertinent part:

> A civil action may be brought--
>
> . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

Gregori's challenges to liability for retaliatory discharge merit only brief discussion. Gregori contends that ERISA § 510 does not protect employees from retaliatory acts which are not

intended to affect their benefit entitlement. Under his reading of the statute, Gregori claims that he is not liable because the plan losses had been suffered long before Schwartz's discharge. Gregori relies on *Humphreys v. Bellaire Corp.*, 966 F.2d 1037 (6th Cir. 1992); and *Rush v. United Technologies*, 930 F.2d 453 (6th Cir. 1991); where this court set forth the elements of a § 510 claim in the context of cases in which each plaintiff in fact claimed that he was discharged to prevent him from becoming eligible for certain plan benefits. Accordingly, this court held that intent to interfere with the attainment of a benefit was, in those cases, an element of the plaintiff's claim. However, in neither *Humphreys* nor *Rush* did the court speak to cases other

than those in which the employer's adverse action was taken to prevent the attainment of plan benefits. The plan language of the statute creates a cause of action based on an employer's retaliation for an employee's exercise of a right to which she is entitled, not just under a benefit plan, but under ERISA itself. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990). Simply put, intent to interfere with the attainment of benefits under a plan is not an element of a retaliation claim such as that made by Schwartz.

Gregori also challenges the district court's factual finding that Schwartz was discharged because she filed suit,

contending that he rebutted Schwartz's prima facie case by proving that her discharge was motivated by legitimate, work-related reasons. We review the court's finding for clear error and find none. The district court was entitled to disbelieve Gregori's stated reasons for the discharge, particularly in light of the facts that: (1) Gregori threatened to fire Schwartz if she filed suit; (2) the reasons given to Schwartz at the time of her discharge were proven to be untrue; and (3) the reasons advanced at trial differed from those given to Schwartz at the time of her discharge. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of

mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."). In sum, we are presented with no basis on which to disturb the finding of liability for retaliatory discharge.

We turn, then, to the relief available to a person who has been discharged in retaliation for exercising a right protected by ERISA. This court previously has approved back pay awards for violations of ERISA § 510,[3] a fact that ordinarily would be dispositive of whether that particular remedy is available. However, Gregori challenged the availability of back pay and front pay on the authority of an intervening Supreme Court decision, requiring that we

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[3]*Fleming v. Ayers & Assoc.*, 948 F.2d 993 (6th Cir. 1991); *Browning v. Gutchess*, No. 87-3420 1988 WL 28798 (6th Cir. Apr. 5, 1988).

address the issue in this light.

In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), the Court held that a nonfiduciary who knowingly participates in a fiduciary's breach of a duty imposed by ERISA is not liable for the resulting losses suffered by the employee benefit plan. The plaintiffs in *Mertens* brought suit under ERISA § 502(a)(3), which, as noted, permits plan participants to file a civil action for "appropriate equitable relief." Categorizing the relief sought by the plaintiffs as compensatory damages, "the classic form of legal relief," the Court held that such damages were precluded by § 502(a)(3). *Id.* at 2068 (emphasis in original; citations omitted).

> The term "equitable relief" can assuredly mean . . . whatever relief a court of equity is empowered to provide in the

> particular case at issue. But . . . "equitable relief" can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).

Id. at 2068-69 (emphasis in original). The question in light of *Mertens*, then, is whether back pay and front pay are equitable or legal remedies.

The parties draw no distinction between front pay and back pay in advancing their competing positions. We assess each remedy distinctly, focusing first on back pay. In *Chauffeurs Local 391 v. Terry*, 494 U.S. 558 (1990), the Court held that employees who seek relief in the form of backpay for their union's alleged breach of the duty of fair representation are entitled to a jury trial under the Seventh Amendment for the reason that they seek legal damages. The

Court focused on the nature of the remedy sought in a fair representation case, money damages, "'the traditional form of relief offered in the courts of law.'" *Id.* at 570 (citation omitted). While emphasizing that it had never held that all awards of monetary relief are necessarily legal in nature, the Court concluded that the relief sought from the union possessed no attributes justifying departure from the general rule that money damages constitute legal relief.

The Court's discussion of the attributes which justify the characterization of a money award as equitable is dispositive here. The Court stated that damages can be characterized as equitable where they are restitutionary, but rejected the proposition that the relief sought by the

employees before it met this test. "The backpay . . . is not money wrongfully held by the Union, but wages and benefits they would have received from [their employer] had the Union processed the employees' grievances properly. Such relief is not restitutionary." *Id.* at 570-71. In contrast, the Court distinguished *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), where it had held that district courts have the equitable power, incidental to their injunctive powers to restrain violations of the Fair Labor Standards Act, to award lost wages to compensate employees wrongfully discharged in retaliation for asserting their rights under the FLSA. Significantly, *Terry* characterized the back pay at issue in *Mitchell* as restitutionary, and stated as well that

relief incidental or intertwined with injunctive relief may be considered to be equitable.[4] *Terry*, 494 U.S. at 571.

Like in *Mitchell*, the back pay at issue in this case was awarded against the employer rather than a third party, and thus operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation. While restitution generally is awarded to prevent unjust enrichment

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[4]Under *Mertens*, we cannot characterize relief as equitable solely because a court sitting in equity has the power to award it. "[L]imiting the sort of relief obtainable under § 502(a)(3) to `equitable relief' in the sense of `whatever relief a common-law court of equity could provide in such a case' would limit the relief not at all. We will not read the statute to render the modifier superfluous." *Mertens*, 113 S. Ct. at 2069 (emphasis in original; footnote and citations omitted). Thus, if *Terry* had characterized the back pay approved in *Mitchell* as equitable simply because it was within the power of a court sitting in equity to award, *Mertens* would preclude a determination that back pay is equitable in nature and available under § 502 (a)(3). However, *Terry* characterized the back pay in *Mitchell* as restitutionary, a remedy expressly recognized by *Mertens* as equitable.

to the defendant, this is not required in every case. Restatement of Restitution § 1 cmt. e (1936). Nor is it necessary that restitution be made in kind, for a court may restore the plaintiff to the position he formerly occupied "either by the return of something which he formerly had or by the receipt of its equivalent in money."[5] 66 Am. Jur. 2d *Restitution and Implied Contracts* § 1 at 942 (1973). While *Terry* did not expound on its reasons for characterizing as restitutionary the award of back pay against an employer for retaliatory discharge, these principles fully support its conclusion. As recognized by

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[5]Contra *Waldrop v. Southern Co. Serv., Inc.*, 24 F.3d 152 (11th Cir. 1994) (categorizing back pay as legal remedy under § 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), and rejecting argument that back pay is restitutionary in nature).

Mertens, restitution is a remedy typically available in equity, and falls within § 502(a)(3)'s category of "appropriate equitable relief." In light of *Mitchell*, *Terry*, and, ultimately, *Mertens*, we conclude that the back pay awarded here constituted restitution, and therefore is an equitable remedy available under § 502(a)(3).

The question of front pay is more straightforward. In other contexts, this court has characterized front pay as an equitable remedy. *E.g.*, *Shore v. Federal Express Corp.*, No. 93-5548, ___ F.3d. __ (6th Cir. Dec. 19, 1994) (front pay under Title VII, 42 U.S.C. § 2000e-5(g), authorizing "equitable relief"); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 398 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 56 (1994) (action under Age

Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), authorizing legal or equitable relief; front pay characterized as equitable). Front pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible. Like the remedy of reinstatement, the availability of front pay is committed to the discretion of the trial court, and review of its decision is for abuse of discretion. *Shore*, slip op. at 6; *Roush*, 10 F.3d at 398. We are presented with no basis or reason for departing from this court's historical assessment of the nature of front pay, and conclude that it is an equitable remedy and consequently available under ERISA § 502(a)(3).

The district court awarded front pay based on the difference between

Schwartz's current income and that which she would have received if her employment with Gregori had continued. The period of time encompassed by the award was eight and one-half years, terminating with Gregori's sixty-fifth birthday. Schwartz's total entitlement was then reduced by half to account for the "obvious uncertainties of the future." Gregori does not challenge the court's calculations.

In determining the amount of front pay, a district court is to consider a number of factors, including the employee's work life expectancy. *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1160 (6th Cir. 1985). The fact that an employee is an at-will employee, like Schwartz, alone would not justify a refusal of front pay, but can be taken

into account in fashioning an appropriate remedy. *See Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 871 (5th Cir. 1991); *Andover Newton Theological Sch., Inc. v. Continental Casualty Co.*, 930 F.2d 89, 94 (1st Cir. 1991). Here, the court effectively ordered front pay for a period of four years. This period is not challenged on appeal, and appears reasonable in light of the fact that the parties had worked together for seventeen years, thirteen as employer/employee.

We therefore **AFFIRM** the judgment against Gregori and Gregori, Inc., for retaliatory discharge and the award of back pay and front pay.

APPENDIX II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIANE SCHWARTZ	)	CASE NO. 4:88 CV 4136
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOSEPH GREGORI, et al.	)	ORDER
	)	
Defendants	)	

Filed July 31, 1993

Battisti, J.

Plaintiff, Diane A. Schwartz, brought this action pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., against defendant Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc., John J. Kuczek, and Kuczek & Associates, Inc. Plaintiff alleges that the defendants breached their fiduciary duties and

wrongfully terminated her because she attempted to enforce her rights as a participant in an employee benefit plan. Plaintiff seeks an accounting of all assets lost as a result of the breach, restitution to the Plan of all losses resulting from the breach, redistribution of assets from the Plan after restitution is made, back pay and benefits, front pay, reinstatement, damages for emotional distress, attorney fees and costs.

This matter came before the Court for trial on May 6, 1992 through May 11, 1992. For the following reasons, the Court concludes that the defendants violated Plaintiff's rights under ERISA and that she is entitled to remedies pursuant to this Court's equitable jurisdiction. Based upon the evidence and arguments presented at trial,

together with such evidence already of record in this case, the Court makes the following finding of fact and conclusions of law.:

FINDINGS OF FACT

1. Defendant Gregory S. Gregori, M.D. ("Dr. Gregori") is a physician who resides and conducts his medical practice within the jurisdiction of this court.

2. Defendant Joseph S. Gregori, M.D., Inc. ("Gregori, Inc.") is an Ohio corporation organized to facilitate the medical practice of Dr. Gregori.

3. Defendant John J. Kuczek ("Kuczek") is an individual engaged in the business of selling insurance and financial planning services. Kuczek resides and conducts his business within the jurisdiction of this Court.

4. Defendant Kuczek and Associates, Inc. ("Kuczek & Associates") is an Ohio corporation organized to facilitate the operation of Kuczek's insurance business.

5. Plaintiff Diane A. Schwartz ("Plaintiff") was employed by Gregori, Inc. as a radiological technician, office manager and medical assistant for thirteen years. Prior to 1975, Plaintiff was employed as an X-ray technician in the doctor's office where Dr. Gregori was employed.

6. In 1975, Dr. Gregori established the Joseph S. Gregori, M.D., Inc. Employers' Pension Plan and Trust Agreement ("the "Plan") at the suggestion of Kuczek, his friend and adviser.

7. Participants in the Plan included Dr. Gregori, Plaintiff and Ann Marie Lamb ("Lamb").

8. Kuczek and Kuczek & Associates assisted and advised Dr. Gregory in setting up the Plan (Tr. 142, Tr. II 27, 58). They were also involved in the subsequent modification of the Plan (Tr. 35).

9. According to Plan documents, Dr. Gregori served as Trustee and Gregori, Inc. served as administrator of the Plan.

10. Investment of Plan assets were handled by Dr. Gregori as Trustee. (Tr. 28). Dr. Gregori relied on Kuczek's investment advice and expertise in making investment decisions. (Tr. II 28).

11. Dr. Gregori had no investment experience. (Tr. II 28). Dr. Gregori made investment decisions based on Kuczek's expertise and experience. (Tr. II 28).

12. Kuczek and Kuczek & Associates has complete access to all plan records, including the accounts of individual Plan participants. Tr. 71-73, 77-78, 156).

13. Kuczek and Kuczek & Associates were compensated for the investment advice that they provided to the Plan. Kuczek & Associates earned a commission on the sale of life insurance policies which were purchased on Plan participants through Kuczek & Associates. (Tr. 51, Tr. II 58-59) They also received a commission on investments they made for the Plan. (Tr. 109-11, 114)

14. In 1983, Dr. Gregori and Kuczek discussed at length investing Plan assets in a commodities fund under the direction of David Meek ("Meek"). (Tr. II 28). Meek was commodity fund advisor and investor. (Tr. 93).

15. In 1983 Dr. Gregori had no knowledge of how the commodities market worked. (Tr. 149).

16. Dr. Gregori and Kuczek discussed the pros and cons of the investment. Kuczek told Gregori that he had investigated the fund and had made the decision to invest. (Tr. II 29).

17. Kuczek's investigation consisted of the following discussing the subject with other consulting professionals who had already invested in the Meek funds, reviewing articles concerning commodities funds in general, reviewing articles concerning Meek and reviewing a placement memorandum outlining the nature of the funds.

18. Kuczek decided to go forward with a limited investment as a test. Kuczek invested personal funds and

recommended to four clients including Gregori, Inc., that they invest relatively small amounts as well. (Tr. 94).

19. In September 1983, Dr. Gregori invested $50,000 of Plan assets on the commodities funds managed by Meek. (Tr. 95).

20. Dr. Gregori delegated complete authority to Kuczek for the investigation and placement of Plan assets with the commodities funds controlled by Meek. (Tr. 166, 169). Dr. Gregori failed to read the disclosure documents concerning these investments even though he represented that he had done so. (Tr. V 36).

21. Plaintiff first learned that plan assets were to be invested in commodities funds in September 1983.

Plaintiff expressed concern that such an investment carried a high risk. Dr. Gregori advised her that only money from his pension fund was being invested. (Tr. 231, Tr. II 60).

22. Dr. Gregori relied on Kuczek and Kuczek & Associates to monitor the progress of this investment. Since the commodities funds in question were privately offered pools, there was no publicly published records as to the progress of these investments. (Tr. 99). Kuczek and Kuczek & Associates relief on unaudited reports issued by the commodities funds to monitor the progress of this investment. (Tr. 98,99).

23. After approximately two months, Kuczek concluded that the investment program was viable and safe for

investment of his own and his clients' funds.

24. In November 1983, Kuczek and two associates traveled to Florida to conduct a due diligence. (Tr. 100). Kuczek wanted to interview Meek, study his operation and otherwise satisfy himself that a more significant study could be made in Meek managed funds. (Tr. 100).

25. Kuczek and his associates questioned Meek and his employees regarding their business practices, investment strategies, and past performance. Kuczek learned that Meek's company had only been in business for eight to nine months. (Tr. 100).

26. Upon examination of Meek's offices, Kuczek found a fully staffed,

equipped and furnished office. (Tr. V 95-98).

27. Since Meek's company had been in business for less than one year, Kuczek asked to review Meek's personal tax returns for the prior two years. (Tr. 100-01). Kuczek did not ask to see any profit or loss statements or any other interim financial statements for the company. (Tr. 100).

28. Kuczek did not contact any of Meek's prior employers to verify his experience and background.

29. Based on his investigation, initial investments, on-site investigation and interviews, Kuczek was satisfied with what he saw.

30. Kuczek advised Meek that he was prepared to recommend to various clients that they invest in Meek managed

commodities funds but insisted upon some additional safeguards. First, separate funds would have to be created to be managed by different account managers. Investments made by Kuczek's clients would then be equally divided among several of the funds which would each be independently managed by professionals retained by Meek. In addition, Meek would provide to Kuczek weekly statements of net asset values, rather than the usual monthly statement for each fund in order that Kuczek could more swiftly advise his clients regarding withdrawal from the funds in the event that the investment performance became poor.

31. Kuczek advised Dr. Gregori of what he had learned about these investments and recommended that a

significant portion of Plan assets be invested in three of the new funds.

32. An additional $108,500 in Plan assets was invested in commodities funds under the direction of Meek. At the time these funds were invested, they represented 45.6% of the total plan assets.

33. Dr. Gregori relied on Kuczek and Kuczek & Associates to monitor the progress of these investments.

34. Reports were issued by Meek on a weekly basis indicating that the funds were performing as expected.

35. In 1984, at Kuczek's suggestion, Plaintiff invested $6,200 of her own money in the commodities deal. (Tr. 238). Kuczek told her that he would guarantee her original investment (Tr. 238, 292).

36. Neither Kuczek nor Kuczek & Associates were licensed to deal in the commodities markets, nor had they had any prior experience with investments of this nature prior to placement of Plan assets with the commodities funds controlled by Meek. (Tr. 31, 98).

37. Prior to the investment of Plan funds in the commodities funds controlled by Meek, the Plan had generally limited its investments to publicly traded mutual or money market funds and loans to local individuals which were secured by real estate mortgages.

38. In June 1984, Dr. Gregori received a letter indicating that federal regulatory authorities had sued Meek because of certain irregularities in the operation of his commodities funds. Dr. Gregori referred the letter to Kuczek

without reading it. Neither Kuczek nor Kuczek & Associates made any effort to seek an independent investigation and evaluation of this litigation, nor did they attempt to withdraw the plan funds which had been invested.

39. In February 1985, Kuczek received a notice that the Commodities Future Trading Commission ("CFTC") was investigating Meek. (Tr. 120). Kuczek responded by contacting Meek. (Tr. 120-21). After talking to Meek, Kuczek was satisfied that the CFTC's investigation was a routine audit and of no concern. (Tr. 122). Kuczek did not contact the CFTC at this time. Kuczek made no attempt to withdraw the invested funds at this time. (Tr. 122).

40. In November 1985, Kuczek sent a memo to his client advising them that the

CFTC had elected to freeze all of the Meek commodities funds. (Tr. 126-27, 164).

41. In June 1987, Kuczek received a letter from Carol Ausflug ("Ausflug") indicating that there had been a loss in the Plans assets. (Tr. 37-38).

42. Ausflug was the owner of QPC , the company employed by the Plan to provide annual administrative work. (Tr. 37, 53-54).

43. The July statement for the Plan indicated that there had been a loss in the pension funds. Plaintiff learned that distributions to the participants of the Plan were reduced by 37.2%.

44. Plaintiff and Lamb confronted Dr. Gregori about the reduction in the Plan's assets. Until this time, Dr. Gregori was not aware that funds from

Plaintiff's pension had been invested in the commodities market.

45. Dr. Gregori scheduled a meeting of participants of the Plan so Kuczek could explain the loss.

46. Kuczek learned that the federal investigation had concluded that Meek embezzled substantially all of the money invested with the commodities funds.

47. The total loss to the Plan was $288,991.09. Plaintiff's share of this loss was $19,728.15. (Stipulation filed May 6, 1992).

48. In August 1987, Dr. Gregori, Plaintiff, Lamb and Ausflug met to discuss the problems with the Plan. (Tr. 239-40). Kuczek informed them that the IRS determined that the lost assets would not be returned to the Plan for distribution at termination.

49. Kuczek offered to make restitution for losses to the Plan. (Tr. 137, 184-85, Tr. II 34). However, Dr. Gregori refused Kuczek's offer because of their friendship. (Tr. 137, 184-85, Tr. II 34). Kuczek did reimburse Plaintiff the $6,200 that she personally invested by repurchasing her shares. (Tr. 239).

50. Dr. Gregori offered to repay the losses suffered by Plaintiff and Lamb with salary bonuses over a three-year period. (Tr. 241, Tr. II 49). The proposed bonuses were not eligible to be rolled over as qualified lump-sum distributions and would be taxable as ordinary income. (Tr. 242). Lamb accepted this proposal. Plaintiff rejected the proposal and demanded a lump-sum payment of $70,389.74.

51. The Plan was terminated on March 31, 1988. Plaintiff received a distribution of $54,381.22. (Tr. 189).

52. As a result of her efforts to enforce her rights as a participant in the Plan, Dr. Gregori reduced Plaintiff's work hours and salary. (Tr. 244-45).

53. After Plaintiff retained legal counsel, Dr. Gregori advised her that further efforts to enforce her rights would result in the termination of her employment. (Tr. 249).

54. On November 10, 1988, Plaintiff filed this action for breach of fiduciary duties against Dr. Gregori and Gregori, Inc.

55. In mid-November Dr. Gregory posted an advertisement in a local hospital looking for an x-ray technician to replace Plaintiff. (Tr. 194).

56. Dr. Gregori told Plaintiff that the applicant would be replacing her while she was on a short vacation. (Tr. 196). He instructed Plaintiff to train the applicant in the operation of the x-ray machine. Plaintiff trained her for two days. (Tr. 196).

57. On December 9, 1988, Dr. Gregori informed Plaintiff by letter that her employment with Gregori, Inc. was terminated (Exhibit 1). Dr. Gregori stated the following reasons for terminating Plaintiff; (1) reduction in hours/scaling back his practice, (2) implementing computerization, (3) his wife's increasing role in the operation of the office. (Plaintiff's Exhibit 16). (Tr.200-01).

58. At trial, Dr. Gregori testified that he terminated Plaintiff for

incompetence, failing to perform her duties, causing a disturbance in the office, failing to communicate and failure to show initiative. (Tr. II 48).

59. Through discovery, Plaintiff obtained a copy of a letter sent by Dr. Gregori on November 11, 1988 to his attorney seeking assistance in preparing a termination letter. The letter indicates that Dr. Gregori had discussed Plaintiff's termination with Kuczek. (Exhibit 13). Dr. Gregori admitted discussing terminating Plaintiff with Kuczek. (Tr. 191).

60. Dr. Gregori's stated reasons for terminating Plaintiff were pretextual.

61. Dr. Gregori has continued his practice of medicine at approximately the same level and with the same number of

employees since the date of Plaintiff's termination. Substantially all of the duties performed by Plaintiff are now distributed among the current employees. (Tr. 203-10).

62. As of December 1991, Dr. Gregori had yet to computerize his office. (Tr. 202).

63. Dr. Gregori's wife worked in his office for a total of four months beginning in November 1988. (Tr. 201, Tr. II 52)

64. Although Dr. Gregori represented that Gregori, Inc. will cease to exist as of Spring 1983, it appears that Dr. Gregori will continue to practice medicine in the foreseeable future. (Tr. II at 54-56). Based upon his representations to Plaintiff, prior to the dispute over the pension funds,

Plaintiff would have continued her employment. (Tr. 235).

65. Plaintiff has been unable to obtain a written reference from Dr. Gregori. (Tr. 254, 301). The lack of a reference from her employer of thirteen years has inhibited her ability to obtain similar employment.

66. Since her termination, Plaintiff has been employed as an x-ray technician at a local hospital. (Tr. 255).

67. Plaintiff has incurred substantial attorneys fees and litigation expenses in the prosecution of this action.

68. Any Conclusion of Law deemed to be a Finding of Fact is incorporated herein.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a conclusion of law is incorporated herein.

2. Jurisdiction is conferred upon this Court by reason of Title 29 U.S.C. § 1001 et seq. known as the Employee Retirement Income Security Act of 1974 ("ERISA") and more specifically Title 29 U.S.C. § 1132(e).

3. At all relevant times, Gregori, Inc. was an employer as that term is defined in 19 U.S.C. § 1002(5)

4. At all relevant times, Plaintiff was an employee of Gregori, Inc. as that term is defined in 29 U.S.C. § 1002(6).

5. At all relevant times, Plaintiff was a participant in the Plan

as that term is defined in 29 U.S.C. § 1002(7).

6. Under ERISA, the term "fiduciary" is defined as follows:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority of control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Congress intended the term to be broadly construed. Donovan v. Mercer, 747 F.2d 304,308 (5th Cir. 1984). "[T]he definition includes persons who have authority and responsibility with respect

to the matter in question, regardless of their formal title." H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A/M/ 4639.5038, 5103. "Thus, `fiduciary' should be defined not only by reference to particular titles, such as `trustee' but also by considering the authority which a particular person has or exercises over an employee benefit plan." Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988) (quoting Donovan, 747 F.2d at 308).

7. Dr. Gregori and Gregori, Inc. were fiduciaries of the Plan under ERISA. 29 U.S.C. § 1002(21)(A) and § 1105(c)(1)(B).

8. Kuczek and Kuczek & Associates were also fiduciaries of the Plan as that term is defined under ERISA. They had the power to manage, acquire or dispose

of any assets of the Plan. They were involved in the establishment and subsequent modification of the Plan and they rendered investment advice to the Plan.

9. An "entity [or individual] need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary, rather, fiduciary status exists with respect to any activity enumerated in the statute over which the entity [or individual] exercises discretion or control." Blatt v. Marshall and Lassman, 812 F.2d 810, 812 (2d Cir. 1987) (citations omitted).

10. Kuczek and Kuczek & Associates were compensated for their investment advice. The Plan held life insurance on its participants. The policies were purchased from Kuczek & Associates and

Kuczek and his corporation received a commission from the sale. Kuczek & Associates also received a fee for placing the funds in the commodities market. Therefore, Kuczek and Kuczek & Associates are fiduciaries as that term is defined under ERISA.

11. Under ERISA, a fiduciary must

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. § 1104 (1)(B).

12. Dr. Gregori has breached his duties as a fiduciary of the Plan.

13. By refusing Kuczek's offer to reimburse the Plan because of his

personal relationship with Kuczek, Dr. Gregori failed to discharge his duties with respect to the Plan solely in the interest of the Plan's participants.

14. By executing Plan documents without reading them or understanding their significance, Dr. Gregori failed to discharge his duties with the required care, skill, prudence and diligence.

15. Dr. Gregori delegated complete and total authority for the investment of Plan assets and the monitoring of those investments to Kuczek and Kuczek & Associates. While a fiduciary may delegate his fiduciary duties to others, he remains liable for the breach of fiduciary responsibilities by another. 29 U.S.C. § 1105(a) and (c). Therefore, Dr. Gregori is liable for any and all

breaches of fiduciary responsibilities by Kuczek and/or Kuczek & Associates.

16. Kuczek and Kuczek & Associates breached their duties as fiduciaries of the Plan.

17. By failing to adequately investigate Meek and his company, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

18. By failing to adequately investigate the actions taken by the CFTC against Meek, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

19. By investing Plan Assets in an area in which they had no prior experience, Kuczek and Kuczek & Associates failed to discharge their

duties with the required care, skill and diligence.

20. By investing Plan assets in a private commodity fund pool which offered no regulatory protections, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

21. By failing to adequately investigate the litigation which was initiated against Meek in June 1984, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

22. By failing to attempt to withdraw Plan assets from the Meek-controlled funds after learning of the CFTC's involvement, Kuczek and Kuczek & Associates failed to discharge their

duties with the required care, skill and diligence.

23. As a direct and proximate result of Dr. Gregori's, Kuczek's and Kuczek & Associates' breach of their fiduciary duties, the Plan suffered a loss of $288,991.09. Plaintiffs' share of their loss totaled $19,728.15.

24. Under ERISA:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan.

29 U.S.A. § 1140.

25. Dr. Gregori unlawfully discharged the Plaintiff.

26. Dr. Gregori's stated reasons for terminating the Plaintiff were pretextual. The true reason for

Plaintiff's termination was that he was upset that she filed this action to enforce her rights as a participant in the Plan.

REMEDY

1. Plaintiff requests an accounting of all Plan assets lost as a result of the Defendants' breach of their fiduciary duties. This request is denied since the parties have stipulated to the amount of the loss.

2. Under ERISA a participant is entitled to obtain other appropriate remedy that will put her in the position she would have been in if the fiduciary had not committed the breach. Warren v. Society National Bank, 903 F.2d 975 (6th Cir. 1990) cert. denied, ____ U.S. ____, 111 S. Ct. 2256 (1991); 29 U.S.C. § 1322 (a)(3)(B). This remedy includes monetary

damages. Id. Therefore, Defendants are jointly and severally liable for the $19,728.15 loss suffered by Plaintiff as a result of Defendants' breach of their fiduciary duties.

3. Plaintiff may recover prejudgment interest on the $19,728.15 loss. Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992), cert. denied, ____ U.S. ____, 113 S.Ct. 2416 (1992) (holding that the award of prejudgment interest in an ERISA action is within the discretion of the district court).

4. Prejudgment interest is awarded in the instant case in order to put the Plaintiff in the position she would have occupied but for the Defendants' breach. Katsaros v. Cody, 744 F.2d 270, 281 (2d

Cir. 1984), cert. denied, 469 U.S. 1072 (1984).

5. To determine prejudgment interest the court relies on 28 U.S.C. § 1961. Laird v. Metropolitan Life Insurance Co., No. C88-2699 (N.D. Ohio June 18, 1993); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1219 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981); Kann v. Keystone Resources, Inc., 575 F. Supp. 108 1096 (W.D. Pa. 1983). The rate of prejudgment interest in an ERI case is a federal question, and 28 U.S.C. § 1961 is applicable the most analogous federal statute. Id.

6. Pursuant to 28 U.S.C. § 1961(a), postjudgment interest is calculated:

> from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by

> the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two weeks United States Treasury bills settled immediately prior to the date of the judgment.

28 U.S.C. § 1961(a) (emphasis added).

7. As directed by § 1961, the Court will calculate prejudgment interest based upon the interest rate paid on a fifty-two week United States Treasury bill. In this regard, however, the reference date for determining the appropriate rate to calculate prejudgment interest will be the date of loss instead of the date of judgment. See Keystone, 575 F. Supp. at 1096, where the court in calculating prejudgment interest, used the rate immediately prior to the date that the plaintiff had first demanded his vested benefits.

8. The rate of prejudgment interest will be the Treasury bill interest rate immediately prior to the date of the Plaintiff's loss, June 30, 1987.

9. The Treasury Bill rate as of June 4, 1987, the date immediately prior to June 30, 1987, is 7 percent. At 7 percent compounded annually from the period of June 30, 1987 to July 31, 1993 the Defendants are jointly and severally liable to the Plaintiff for prejudgment interest in the amount of $ 10,077.

10. Plaintiff requests an award of attorney's fees and costs. Section 502(g)(1) of ERISA, 29 USC § 1132(g)(1) provides that "the court in its discretion <u>may</u> allow a reasonable attorney's fee and costs of action to either party." (emphasis added).

11. Factors to assist the court in deciding whether to award attorney's fees include: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA and (5) the relative merits of the parties' positions. Hummel v. SE Rykoff & Co., 634 F.2d 446, 452 (9th Cir. 1980).

12. Plaintiff is awarded attorney's fees since the Defendants, in bad faith, clearly violated their fiduciary duties.

13. Title 29 U.S.C. § 1132 is the applicable statute to enforce ERISA's unlawful discharge provision, 29 U.S.C. § 1140, which prohibits an employer from discharging an employee for exercising any right to which she is entitled under the provisions of an employee benefit plan. 29 U.S.C. § 1140.

14. Under § 1132 a civil action may be brought

> (3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan

29 U.S.C. § 1132 (a)(3)(B).

15. At all relevant times, Plaintiff was a participant in the Plan as that term is defined in 29 U.S.C. § 1002 (7).

16. Although the Sixth Circuit has not addressed the issue of awarding damages such as back pay, reinstatement to former position, front pay, and restitution of unforfeited employees benefit for violating § 1140, other district courts have allowed such awards pursuant to § 1132 (a)(3)(B). See Foltz v. Marriot Corp., 594 F. Supp. 1007 (W.D. Mo. 1984); Bittner v. Sadoff & Rudd Ind., 490 F. Supp. 534 (E.D. Wis. 1980). In Folz, it was held that "[a] careful review of the pertinent statutory language and legislative history of ERISA, along with a comparison of ERISA to similar remedial statutes, [such as Title VII and ADEA], leads this Court to conclude that its equitable power under ERISA is not limited to mere reinstatement of pension plan benefits.

Rather, . . . it has the equitable power under ERISA to put the plaintiff `back into the position he enjoyed before the discharge'." Folz 594 F. Supp. at 1016, citing Bittner, 490 F.Supp. at 536. This reasoning is adopted.

17. Plaintiff is awarded back pay in the amount of $57,765 against Dr. Gregori and Gregori, Inc. This amount is the difference between the Plaintiff's actual salary and the salary Plaintiff would have earned from Dr. Gregori. The calculation covers the period from the date of discharge to the date of judgment. (see Plaintiff's Exhibit 32).

18. Plaintiff seeks an award of front pay in lieu of reinstatement. In this case, front pay may be awarded to the Plaintiff since reinstatement is unreasonable due to the extreme hostility

existing between the parties. Folz, 594 F. Supp. at 1018.

19. However, "`[F]ront pay' does not appear to lend itself to a per se rule . . . . [It] must be governed by the sound discretion of the trial court and may not be appropriate in all cases." Davis v. Combustion Engineering, 742 F. 2d 916, 922-23 (6th Cir. 1984). The trial court's discretion includes determining the cut-off date for the award of front pay. Shore v. Federal Express Corp., 777 F. 2d. 1155, 1160 (6th Cir. 1985). See, Gos? v. Exxon Office Systems Co., 747 F.2d 885 (3rd Cir. 1984) (holding that the district court did not abuse its discretion by limiting front pay to a period of four months); Davis, 742 F.2d at 92 (stating that the award of front pay to a discriminatorily

discharged 41 year old employee until he qualifies for a pension plan might be unwarranted, however, the failure to make such an award to a 63 year old might be an abuse of discretion).

20. In the instant case, the total amount of front pay that might be awarded the Plaintiff was arrived at by calculating the difference between Plaintiff's current annual income from the date of judgment - adjusted to reflect the fact that the Plaintiff is currently working one more day a week than she did when employed by Dr. Gregori - and the income Plaintiff would have made if she were still employed by Dr. Gregori through the year 2001 when he reaches age 65, the normal retirement age. The difference in annual income was discounted to its present value and

resulted in an amount of $84,887. (See Plaintiff's Exhibit 32).

21. However, due to the obvious uncertainties of the future it seems fair to reduce the above figure by fifty percent. Thus, the Plaintiff is awarded front pay in the amount of $42,443 against Dr. Gregori and Gregori Inc.

22. Plaintiff's claim for emotional distress damages is denied. They are unavailable under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Sokol v. Bernstein, 803 F.2d 532, 534 (9th Cir.1986).

23. Based on the applicable law and the totality of the circumstances the Court finds that the Plaintiff has been adequately compensated and denies any and all other relief requested by Plaintiff in her pleadings or during the trial.

Accordingly, as a matter of law, Plaintiff is entitled to judgment (1) on her breach of fiduciary duty claim against Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc., John J. Kuczek and Kuczek & Associates, Inc.; and, (2) on her wrongful discharge claim against Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc. She is awarded damages as follows:

1. Restitution for the loss she suffered against Defendants, jointly and severally, in the amount of $19,728.15.

2. Prejudgment interest on the loss against Defendants, jointly and severally in the amount of $10,077.

3. Back pay against Defendant Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc. in the amount of $59,764.

4. Front pay against Defendant Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc. in the amount of $42,443.

5. Plaintiff is awarded attorney's fees. The amount will be specified, seasonably, in an amended order after receiving an affidavit from Plaintiff's counsel setting forth the applicable hours and rates. The affidavit shall be submitted within 7 days of the entry of this Order.

IT IS SO ORDERED.

Frank J. Battisti, United States District Judge

APPENDIX III

No. 93-3964

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIANE A. SCHWARTZ, Plaintiff-Appellee/ Cross-Appellant,	)	
v.	)	O R D E R
JOSEPH S. GREGORI, M.D., et al. Defendants-Appellants/ Cross-Appellees.	)	

Filed March 17, 1995

BEFORE: MILBURN and SUHRHEINRICH, Circuit Judges; and JOINER*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a

vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation

APPENDIX IV

ERISA § 540, 29 U.S.C. § 1140, provides as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. s 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

APPENDIX V

ERISA § 502(a), 29 U.S.C. § 1132(a) provides in pertinent part as follows:

(a) **Persons empowered to bring a civil action.** A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in

subsection (b) of this section, by the Secretary

(A) to enjoin any act or practice which violates any provision of this subchapter, or

(B) to obtain other appropriate equitable relief

(i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title,

(A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or

(B) to obtain appropriate equitable relief

(i) to redress such violation or (ii) to enforce such subsection.

Supreme Court, U.S.
FILED
AUG 0 8 1995
OFFICE OF THE CLERK

No. 94-2035

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH S. GREGORI, M.D., AND JOSEPH S. GREGORI, M.D., INC., Individually, and as Trustee, and Administrator of Pension Plan and Trust,

Petitioner,

v.

DIANE ALICE SCHWARTZ,

Respondent.

On Petition For Writ of Certiorari To the United States Court of Appeals For The Sixth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the decision of the Sixth Circuit granting equitable relief to Respondent pursuant to its authority under Federal Law, §510, 29 U.S.C. §1140, §502, 29 U.S.C. 1132(a)(3)(B) is a (1) correct interpretation of the Statute under review, (2) not in conflict with other Circuits, and (3) consistent with this Court's previous decisions on the subject matter.

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No. 94-2035

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH S. GREGORI, M.D., AND JOSEPH S. GREGORI, M.D., INC.,
Individually, and
as Trustee, and Administrator of
Pension Plan and Trust,

Petitioner,

v.

DIANE ALICE SCHWARTZ,

Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE U.S. SUPREME COURT:

The Respondent, Diane A. Schwartz, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Joseph S. Gregori, M.D, et. al.

OPINIONS BELOW

The Sixth Circuit Court of Appeals affirmed the trial court's judgment against the Petitioner, Joseph S. Gregori, M.D, and Joseph S. Gregori, Inc., for retaliatory discharge and awarded Respondent back pay and front pay, rejecting Petitioners' arguments that he was not liable under §510 (29 U.S.C. §1140), and that the relief sought by Respondent was not provided for under ERISA §502(a)(3)(B), 29 U.S.C.§1132(a)(3)(B). The Court's opinion is reported at 45 F. 3d 1017, and is reprinted in the Appendix to Petitioners' Writ For Certiorari, (hereinafter referred to as App. I, pages Al - A27).

Following issuance of the Sixth Circuit Opinion, Gregori petitioned for a rehearing or in the alternative A Suggestion for Rehearing en banc. The Sixth Circuit denied both petitions. The Court's Order is unpublished, however, the Order denying a Rehearing is reproduced in the Appendix to Petitioners' Writ For Certiorari. (App. III, page A74 - A75).

The Order of the United States District Court for the Northern district of Ohio entering Judgment in favor of Diane A. Schwartz (1) on her breach of fiduciary duty claim against Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc., et. al.; and (2) on her wrongful discharge claim against Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc., and the award of damages, is unpublished; however, the Order is reproduced in Petitioners' Appendix to his Writ of Certiorari. (App. II, pages A28 - A73).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent, Diane A. Schwartz, was employed as a radiological technologist in the newly formed medical office of Petitioner in 1975. The parties had previously worked together in another medical office since 1971, and when Petitioner started his own practice, Schwartz was hired as his radiological technologist. A year later, Schwartz became his office manager.

In 1975, Petitioner formed an Employer's Pension Plan wherein he served as trustee of the plan individually, and Gregori, Incorporated, served as administrator. The Plan was known as the Joseph S. Gregori, M.D., Inc.

Employer's Pension Plan. In 1987, the parties learned that the plan had suffered a substantial financial loss. Thereafter, on numerous occasions for the next year, Respondent met with Petitioner to discuss reimbursement of her pension funds, and making her whole as a participant in the plan, all pursuant to the protection provided to her under federal law, the Employee Retirement Income Security Act (hereinafter ERISA), specifically 29 U.S.C. §1104(a)(l)(B) and 29 U.S.C. §1109. The pension plan lost $288,999.00 with Schwartz taking a loss of her share in the sum of $19,728.00.

In response to Respondent's efforts to enforce her rights as a plan participant, Petitioner reduced her work hours and salary. When Respondent retained an attorney, the Petitioner, after receiving the attorney's letter, threatened Respondent with termination of employment should she further attempt to enforce her pension rights.

On November 10, 1988, Respondent filed an action in U.S. District court for reimbursement of her lost pension funds alleging breach of fiduciary duty by Petitioner under ERISA, 29 U.S.C. §1104. On December 9, 1988, Petitioner discharged Respondent in retaliation, and in violation of ERISA, 29 U.S.C. §1140 (§510).[1]

The District Court, on July 31, 1993, after a bench trial in May 1992, found that Petitioner had violated Respondent's rights under ERISA, and that she was entitled to remedies pursuant to the Court's equitable jurisdiction. Specifically, the District Court, after lengthy testimony, found that Petitioner had violated Respondent's right to have her pension funds invested with due care under 29 U.S.C. §1104, and Petitioner, therefore, had breached his fiduciary duty, and was liable for the loss. The Court ordered Petitioner to make restitution to Respondent's pension plan, with prejudgment interest. The District Court further determined that Petitioner violated Respondent's rights when he retaliated against her by discharging her from her employment in violation of ERISA §510 (29 U.S.C. §1140). As a remedy, the Court

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[1]Schwartz's original action asserted a breach of fiduciary duty claim against Petitioner Gregori seeking reimbursement of losses to the plan. After Schwartz was illegally discharged, she amended her complaint adding a claim under 29 U.S.C. §1140 (§510) seeking equitable relief for lost wages.

awarded Respondent restitution in the form of back pay and in lieu of reinstatement to her former position, front pay. Petitioner, Joseph S. Gregori, M.D., et. al., appealed the District Court's ruling to the Sixth Circuit on August 25, 1993. The case was fully briefed for appeal, and oral argument was held on November 29, 1994.

On January 31, 1995, the Sixth Circuit rendered its opinion affirming the trial court's judgment against Petitioners, Gregori and Gregori, Inc., for retaliatory discharge and the award of back pay and front pay.[2] The Sixth Circuit, after carefully analyzing the ERISA Statute under its purview, and in light of this Court's recent holding in Mertens v. Hewitt Associates, 113 S. Ct. 2063, 124 L. Ed. 2d 169 (1993), found that Respondent was entitled to restitution in the form of back pay and front pay, a traditional remedy in equity, provided for under the ERISA enforcement Section §502, 29 U.S.C. §1132(a)(3)(B), and applicable to this case consequent to Petitioners' violation of §510. Petitioner seeks a Writ of Certiorari challenging the Sixth Circuit's decision that equitable relief is appropriate as awarded to Respondent, on the basis that a conflict exists among the various Circuits, and that the Sixth Circuit opinion is inconsistent with this Court's previous holdings on the subject matter.

Contrary to Petitioners' contention that the decision below is in conflict with other circuit decisions, none of the Circuit Court cases cited[3] by Petitioner in support of this position are applicable to the ERISA Statute under review here, and as none of these decisions speak to ERISA, they cannot be found to be in conflict with the decision by the Sixth Circuit in this case.

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[2] The original cause of action commenced by Respondent for restitution to her pension plan was settled after the filing of the appeal in the Sixth Circuit. A second party defendant, John Kuzcek, the plan's financial advisor, who had been joined as a party defendant and fiduciary, agreed to reimburse Respondent for the loss she suffered. Kuzcek was dismissed as a party. Therefore, the only issue before the Court below was Schwartz's right to relief consequent to illegal discharge under §510 (29 U.S.C. §1140).

[3] Crocker v. Piedmont Aviation, Inc., 49 F. 3d 735 (D.C. Cir. 1995); Setser v. Novack Investment Co., 638 F. 2d 1137 (8th Cir.1980); Waldrop v. Southern Company Services, Inc.,

(Footnote Continued)

Therefore, Petitioner misapplies the law as pronounced by these various other Circuit Court opinions wherein these Courts do not even address the issues raised in this case.

Petitioners challenge to the decision of the Court below on the basis of this Court's holding in Mertens is also clearly misplaced. The issue in Mertens, as delineated by Justice Scalia, concerned the liability of a non-fiduciary for losses that an employee suffers as a result of the knowing participation in a breach of fiduciary duty, see Mertens,[4] 124 L. Ed. 2d at p. 166.

The Mertens case does not address the question here - what are the federal courts equitable powers when a plan participant like Respondent Schwartz is illegally discharged in violation of §510 for attempting to enforce her rights under an ERISA pension plan - and is inapplicable to the issues in this case.

Moreover, any other result other than the one reached by the Court below would be an unduly restrictive limitation placed upon the civil enforcement remedies provided in §502 for a §510 violation, and would deprive federal courts of its equitable powers to fashion appropriate equitable relief as derived from the ERISA statutory scheme and defeat the legislative intent of §510 and the remedial nature of ERISA, and unjustly and unfairly deprive Respondent Schwartz from the Restitution to which she is entitled.

(Footnote Continued)

24 F. 3d 152 (11th Cir. 1994).

Each of these Circuit Court decisions review back pay against the framework of a statute materially different than ERISA, and are inapposite to this case, see Crocker, 49 F. 3d 735 at page 749, Setser, 638 F. 2d 1137 at p. 1141 and Waldrop, 24 F. 3d 152 at p. 158.

[4] Mertens addressed liability under §502(a)(3)(B) as it extends to a non fiduciary actuary under a pension plan action for breach of fiduciary duty, and the complaining party did not seek the equitable remedy of Restitution, as did Schwartz here. In fact, as noted by Justice Scalia, the Petitioner's main objective was to seek relief under §502(a)(3)(B). Unlike the Mertens decision, the District Court in this case awarded Schwartz restitution as a form of "other appropriate equitable relief", and the Sixth Circuit agreed and affirmed. Therefore, Petitioners' attempt to preclude Respondent from obtaining relief on the authority of this Court's decision in Mertens is misguided.

SUMMARY OF THE ARGUMENT

Petitioner's contentions that a conflict between Circuit Courts exist is in error, when the cases Petitioner cites in support of this contention are distinguishable and materially different than this case, and Petitioner misinterprets the ERISA statute under review here. Further, Petitioner misconstrues previous decisions of this court in an effort to unjustly, unfairly, and improperly deny the Respondent a remedy available to her under ERISA for equitable relief.

ERISA §510, 29 U.S.C. §1140 was designed to protect the employment relationship. The federal district court in this case acted well within the scope of its equitable powers and its discretion in accord with ERISA §510's enforcement section §502, 29 U.S.C. §1132(a)(3)(B)'s category of "other appropriate equitable relief" for a violation by Petitioner of §510's prohibition against unlawful retaliatory discharge. The district courts award of back and front pay constituted an appropriate exercise of the Court's discretion to fashion relief of a restitutionary nature, indisputably an equitable remedy; and, is in accord with other federal court decisions as to the legislative aim of §510 and the remedies available thereunder.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT DECISION IN THIS CASE IS A CORRECT, JUST AND FAIR INTERPRETATION OF THE LAW UNDER REVIEW, AND IS IN ACCORD WITH OTHER FEDERAL COURT OPINIONS ON THE SUBJECT OF ERISA §510 VIOLATIONS AND BACK PAY AND FRONT PAY AWARDS PURSUANT TO §502(a)(3)(B).

The Sixth Circuit held that back and front pay are available equitable remedies for violations of ERISA §510[5], and other federal courts are in ac-

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[5]Contrary to Petitioner's assertion that the issue of back pay and front pay is a source of conflict, there are no other federal circuit court decisions that have reviewed a trial court's exercise of discretion to award such relief pursuant to a finding of liability for a §510 violation, through the enforcement section of ERISA §502(A)(3)(B).

cord. In Folz v. Marriott, 594 F. Supp. 1007 (1984) (Dist. Ct. Mo.), the employer, Marriott, contended, as do the Petitioners here, that ERISA was designed to protect retirement income and not salary and wages, and, therefore, back pay is not available as a remedy for a §510 illegal discharge. The Folz Court rejected Marriott's interpretation of ERISA's remedies, and determined that the illegal discharge "is the kind of discharge ERISA was enacted to prevent," and Folz held that back pay was an appropriate remedy under §502(a)(3)(B)'s "other appropriate equitable relief category", Folz 594 Fed. Supp. at p. 1015. Folz determined that ERISA legislative history indicated that the Court has broad equitable powers and compels the conclusion that this Court's equitable power under ERISA is broad enough to recreate the circumstances that would have existed absent an employer's illegal conduct, Folz, 594 Fed. Supp. at 1015.[6]

In Bittner v. Sadoff and Rudoff Industries, 490 Fed. Supp. 534, the Court held that back pay under §502(a)(3)(B)(i) was an appropriate equitable remedy for a §510 violation. The Bittner Court found that when considering a §510 violation, "chief among the equitable remedies is the remedy of restitution."[7]

The decisions in Folz and Bittner declare that the remedy of back pay for a §510 violation is clearly available under §502(a)(3)(B).[8] Further, the decision below upholding a front pay award in lieu of reinstatement (indisputably an equitable remedy), and determining such relief to be available under §502(a)(3)(B)(i) is a reasonable interpretation of ERISA §510 under the facts in this case, and Petitioner advances no compelling argument to limit the trial court's discretion to provide such a remedy. Petitioner offers neither federal appellate nor district court decisions that are contrary to the Sixth Circuit decision in this case, and his Petition should be denied.

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[6]Folz cites Kross v. Western Electric Co., Inc., 701 F. 2d 1238 (7th Cir. 1987) for its holding that ERISA is a remedial statute to be liberally construed.

[7]Bittner citing Rogers v. Loether, 467 F. 2d 1110, 1117 (7th Cir. 1992).

[8]See also, in accord, Boesl v. Suburban Trust & Sav. Bank, 642 F. Supp. 1503, 1515 (N.D. Ill. 1986).

II.

THE SIXTH CIRCUIT HOLDING IS CONSISTENT WITH THIS COURT'S DECISIONS.

Petitioner contends that the Sixth Circuit opinion failed to consider this Court's decision in Mertens. To the contrary, the Court below fully considered the issue here in light of Mertens and Judge Joiner held that Mertens' recognition of restitution as a form of relief typically available in equity is consistent with the district court's award here of back pay and front pay, relief which is restitutionary in nature. (See App. I to Petitioners' Writ at page A18-24). Further, the relief sought in Mertens is clearly different than the remedy of restitution sought by Schwartz in this case. As pointed out by Justice Scalia, Mertens is not a case where Petitioners "seek a remedy traditionally viewed as 'equitable', such as injunction and restitution", Mertens, 124 L. Ed. 2d at p. 169.

Next, Petitioner contends that because Respondent did not work after being discharged, she did not confer any benefit upon her employer, and that she should not be awarded restitution. This argument is without merit, and was rejected by the Court below. The Court below determined that, while restitution generally is awarded to prevent unjust enrichment to the defendant, that is not required in every case, see App. I to Petitioner's Writ, page A23.

Petitioner misstates the Restatement of the Law of Restitution when he asserts that unjust enrichment is a prerequisite to awarding restitution, and that the person sought to be held liable for restitution possesses some benefit which should properly be disgorged, see Petitioner's Writ at p. 26. A reading of the complete text of the law of the Restatement of Restitution indicates that the Petitioner has selectively quoted from these volumes in an effort to place an unduly restrictive definition upon the remedy of restitution. In this regard, the Court's attention is directed to the following language from the Restatement of the Law of Restitution, Chapter 1 Introductory Matters, §1 Unjust Enrichment, Comment: (e):

> "On the other hand, a person who has been unjustly deprived of his property or its value or the value of his labor may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby."

Therefore, contrary to Petitioner's representations on the law of Restitution, the facts of this case do fit within the definition of the equitable remedy of restitution. As Judge Joiner stated, restitution may be made in the form of monetary relief, and Respondent Schwartz's equitable action under ERISA entitles her to back pay as restitution to restore her to the position she occupied prior to her wrongful discharge, see App. I to Petitioner's Writ at p. A 22,23.

The Sixth Circuit further found that this Court in Mitcheli v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) decided that district courts have the equitable power to award lost wages to compensate employees wrongfully discharged in retaliation for asserting their rights under the Fair Labor Standards Act, see App. I to Petitioner's Writ at p. A21. The Court below went on to say that the back pay in Mitchell, as with Schwartz, "operates to restore to the Plaintiff that to which she would have enjoyed but for the employer's illegal retaliation." (App. I to Petitioner's Writ at p. A22).

Petitioners argue that the Court below misconstrued the Mitchell decision, and its decision is inconsistent therewith. In support of his argument, Petitioner contends that the Mitchell holding approved back pay as a restitutionary form of relief under the first cause of action, but did not approve this type of relief in the second cause of action for wrongful discharge. This is not what the Mitchell Court held, and it is the Petitioner who misreads Mitchell, not the Sixth Circuit.

This Court in Mitchell determined that the employee was entitled to the remedy of lost wages as restitution pursuant to the statute under review, the Fair Labor Standards Act of 1938, §15(a)(3), 29 U.S.C. §215(a)(3) (FLSA). The employee in Mitchell, like Respondent Schwartz, sued his employer for relief after the employer discharged him for enforcing his rights under the FLSA. The employee in Mitchell sued originally for overtime compensation and other deficiencies in the wage owed him by the employer. The employer retaliated by discharging the employee and a second cause of action arose under FLSA.

Petitioner's argument contends, erroneously, that the Mitchell Court approved back pay as restitution under the aggrieved employee's first cause of action where services were performed and not duly compensated, distinguishable from the second cause of action based upon wrongful discharge. Fol-

lowing this line of reasoning, Petitioner argues that in the second cause of action, the employer does not receive any benefit after the discharge, and the damages flowing therefrom cannot be restitutionary in nature.

The Mitchell Court does not, however, speak to the employee's first cause of action for loss of income due to deficiencies in pay. Mitchell addresses the second cause of action for wrongful discharge under the FLSA, and speaking for the Court, Justice Harlan said the question was whether in an action regarding wrongful discharge the remedy of reimbursement for loss of wages is available under the statute, Mitchell, 361 U.S. at p. 289. Petitioner, however, disregards the Mitchell Court's clear and unmistakable decision that the district court's award of back pay was restitutionary, and in a rambling, disjointed discussion of Mitchell, employing specious reasoning, the Petitioner concludes, erroneously, that the back pay in Mitchell is distinguishable from the back pay awarded to Schwartz, see Petitioner's Writ at p. 19. Petitioner's conclusion is also contrary to this Court's holding in Chauffeurs, Teamsters and Helpers Union Local No. 391 v. Terry 494 U.S. 558 (1990), which recognized the relief in Mitchell of back pay as restitutionary, Terry, 494 U.S. 558, 571.

And not insignificantly, Petitioner overlooks Mitchell's disapproval of the position Petitioner advances here concerning Respondent's entitlement to Restitution for back pay and front pay, wherein the Mitchell Court holds that the employer "cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services", Mitchell 361 U.S. 288, 293.

Petitioner also misinterprets this Court's decision in Terry, and concludes that the Sixth Circuit decision in this case is inconsistent with the principles therein. This Court in Terry examined back pay sought pursuant to the National Labor Relations Act, 29 U.S.C. §159(a) (1982) (NLRA). While the Terry Court determined the back pay in that case to be legal in nature, this Court, in its wisdom, also recognized that back pay can be restitutionary, citing Mitchell as an example, see Terry, 494 U.S. 571. Terry was also careful to limit its characterization of back pay to the statute's interpretation under its purview, the NLRA, and to distinguish back pay under the NLRA

from relief sought for back pay pursuant to other federal statutes. Wherefore, Terry held: "Thus, the remedy sought in this duty of fair representation case is clearly different from back pay for violations of Title VII, see Terry, 494 U.S. at p. 572. Hence, as Terry points out, "the remedies appropriate for unfair labor practices may differ from the remedies for a breach of duty of fair representation, given the need to vindicate different goals," see Terry, 494 U.S. at p. 573.

Likewise, the remedies for a retaliatory discharge under ERISA §510 for back pay pursuant to §502, are clearly different than the remedies sought in Terry. Respondent Schwartz says, therefore, that the Terry holding clearly recognizes the equitable relief awarded to her as an appropriate restitutionary remedy and further, Terry is not inconsistent with the Sixth Circuit decision in this case as Terry does not address the remedies under the ERISA framework, and limits the scope of its decision to the NLRA.

III.

§510, 29 U.S.C. §1140 WAS ENACTED BY CONGRESS TO PROTECT THE EMPLOYMENT RELATIONSHIP AND CREATES A CAUSE OF ACTION FOR RETALIATORY DISCHARGE.

Petitioner argues, erroneously, that the legislative purpose of §510 was to protect pension plan entitlement, and not the employment relationship per se, see Petitioner's Writ of Certiorari at page 49. This contention is contrary to the legislative aim of §510 as interpreted by federal courts[9], and was rejected by the Sixth Circuit, wherein Judge Joiner stated that ERISA §510 protects the employee against illegal discharge and "the plain language of the statute creates a cause of action based on an employer's retaliation for an employee's exercise of a right to which she is entitled, not just under a ben-

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[9] See, e.g., Folz 594 F. Supp. 1007, 1016 (1984), the Court under ERISA's remedial aims has the equitable power not limited to mere reinstatement of pension plan benefits. The Court concludes it has the equitable power under ERISA to put the Plaintiff "back into the position he enjoyed before the discharge, including back pay, reinstatement, restitution, and any other relief necessary to make him whole." See also, Conkwright v. Westinghouse Electric Corp., 933 F. 2d 231, 236 (4th Cir. 1991); McGath v. Auto Body North Shore, Inc., 7 F. 3d 665, 667-669 (7th Cir. 1993).

efit plan, but under ERISA itself. Simply put, intent to interfere with the attainment of benefits under a plan is not an element of a retaliation claim such as that made by Schwartz," see, App. I to Petitioner's Writ at page A-15.

Petitioner also misconstrues the Sixth Circuit case of West v. Butler, 621 F. 240 (6th Cir. 1980), see Petitioner's Writ at p. 49. The Court in West interprets the legislative aim of §510 is to protect the employment relationship, and West does not hold, as Petitioner contends, that §510 was intended to protect the pension rights which resulted from the employment relationship. In McGath v. Auto Body North Shore, Inc., 7 F. 3d 665 (7th Cir. 1993) in referring to the West decision, the Seventh Circuit Court said, noting agreement with their colleagues in the Sixth Circuit: "Congress designed §510 primarily to protect the employment relationship that gives rise to an individual's pension plan rights, . . . this means that a fundamental prerequisite to a §510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way," see McGath, 7 F. 3d at 668, 669. The focus of §510, then, is upon the employment relationship.

Petitioner, however, misstates the plain language of §510, at page 51 of his Writ For Certiorari, when Petitioner contends that back pay and front pay are not necessary remedies to effectuate the legislative goals of §510. Under Petitioner's reading of the statute, the legislative aim of §510 to prevent and make unlawful the kind of egregious retaliatory discharge that occurred in this case would be defeated. And, under Petitioner's reading of §510, the plain language of §510 regarding the provision for relief governed by §502(a)(3)(B)(i) would be ignored, thereby depriving employees of an enforcement tool, or remedy to redress a violation for unlawful discharge. Petitioner further argues, in error, that the Sixth Circuit decision expanded the scope of the remedies under §502(a), see Petitioner's Writ For Certiorari at page 52. Petitioner's argument, however, is premised on a myopic view of §510, wherein Petitioner incorrectly assumes that §510's aim is to encompass only pension plan rights, when §510 was enacted to safeguard against the kind of retaliatory discharge that occurred in this case, among other rights thereunder.

Respondent Schwartz asserts that this case is illustrative of the kind of

protection ERISA was intended to provide to a pension plan participant, who was wrongfully discharged under §510; and, that the back and front pay award under the facts of this case, the abundant evidence establishing an actionable wrongful discharge under §510, is consistent with the remedial nature of ERISA, and within the scope of the Court's equitable powers under §502(a)(3)(B) to fashion appropriate relief.

IV.

PETITIONERS' CONTENTION THAT THE SIXTH CIRCUIT DECISION IN THIS CASE IS IN CONFLICT WITH OTHER CIRCUIT COURT OPINIONS IS WITHOUT MERIT.

Since Petitioner relies on three cases to support its argument that a conflict exists thereby creating jurisdiction in this Court to settle the issue, Respondent should indicate why the decisions in these cases of Waldrop, Crocker, and Setser, are inapplicable here.

First, none of the three cases speak even tangentially to the ERISA Statute under review here, and the decisions, therefore, are not dispositive of the issues in this case.

Second, Petitioners' attempt to apply the holdings in Waldrop, Crocker and Setser to the instant case is based on flawed analysis. Petitioner argues in his brief at page 33, footnote 8 that the basic elements of Crocker, Waldrop and Setser are the same as the case at bar, and that the only difference - the particular statute under review - has no impact on the underlying analysis of these Courts with respect to its characterization of back pay as the equitable remedy of restitution. Even a cursory reading of these cases reveals that Petitioner misinterprets the opinions of these Circuit Courts.

Petitioners' argument rests on the false assumption that the particular statute under review by these Appellate Courts is irrelevant to the Court's determination of the nature of back pay when, in fact, the Courts each scrutinize the statute under its review in terms of how the statute defines or does not define the relief sought thereunder. Central to the Crocker court inquiry, for example, is its analysis of the Federal Aviation Act wherein the Court states: "Here, of course, we have no statutory provision creating the cause of action or identifying the available remedies," Crocker, Id. at 749. ERISA, on the other hand, clearly has language under §502 creating the cause of

action and setting out the remedies.

Further illustrative of the Courts focus on the statute under review is the Crocker Court acknowledgment that the remedy is dependent upon the statutory scheme wherein the Crocker Court says that the U.S. Supreme Court has characterized lost wages and back pay remedies as equitable when the power to award such amounts was derived from a statutory grant of authority, Crocker, 49 F. 3d at p. 748.

Hence, the key to the Crocker Court's characterization of the nature of the remedy of lost wages is the statute under review, and the Crocker Court makes clear that the Court's equitable powers are derived from the statute when it states: "The Court characterized this implied power as equitable, not because lost wage relief sounds in equity, but rather because it arose derivatively from the equitable injunctive powers granted by the statute", citing Mitchell, see Crocker, at p. 740.

Thus, Petitioner misinterprets the Crocker holding as one in conflict with the Court decision below when Crocker clearly recognizes that the District Court has explicit power to enjoin retaliatory discharges and award whatever supplemental relief necessary to further the purpose of the statute including lost wages, Crocker, 49 F. 3d 735 at 748.

Petitioner also misapplies the holdings in both Waldrop and Setser to this case. In Waldrop, central to the Court's inquiry were two federal statutes, materially different than ERISA, and inapposite to the case at bar.

Appellant Waldrop sought relief in the form of reinstatement to her former position as she was discharged in violation of her rights under (1) Age Discrimination in Employment Act of 1967 [10] ("ADEA") and the (2) Rehabilitation Act.[11]

Clearly, the Waldrop Appeals Court decision does not speak to ERISA and is not dispositive on the issue before this Court. Instead, Waldrop addresses §504, the statute under its purview.[12] The Waldrop Court looked to

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[10] 29 U.S.C.A. §621 to 634.

[11] 29 U.S.C.A. §701-796 f-6 (West 1985 & 1994 Supp.) (§504, or "Rehabilitation Act").

[12] Significantly, the Waldrop Court states its analysis is to put the request for a back pay award under §504 against the framework of restitution law to determine whether back pay constitutes legal or equitable relief, Id. at 158. This analysis under §504 is ignored by Petitioner when Petitioner asserts that the statute has no import.

the language of the "ADEA" and the "Rehabilitation" Act for guidance and found that neither statute contained provisions indicating the procedures involved in suits by private parties, nor did they set forth the remedies available for violations of the statute. Whereas, in the case, sub judice, §502(a)(3)(B) makes provision for who may file a civil suit and the remedies thereunder, clearly distinguishable from the Waldrop case.

Due to the lack of statutory language identifying remedies in both Crocker and Waldrop, these Courts analogized to other comparable federal statutes such as Title VII, 42 U.S.C. §2000-5(a)(l) of the Civil Rights Act, and §17 of the Fair Labor Standards Act, 29 U.S.C. §217 in order to determine whether these statutes were comparable to the lawsuit under review, and to ascertain the nature of the remedy of back pay - equitable or legal. This approach by the Courts in Crocker and Waldrop evidences the courts focus upon the grant of authority derived from the statute under review, and further makes clear the governing role of the statute under the Courts purview, contrary to the faulty assumption by Petitioner that the particular statute is irrelevant to the issue of whether back pay is an available remedy.

Petitioner additionally contends that the Court of Appeals in Setser v. Novack, 638 F. 2d 1137 (1980) is a decision in conflict with the opinion of the Court below. Again, Petitioner misstates the pronouncement of the law as set forth in this case, as Setser does not speak to ERISA, but instead interprets the remedy of back pay within the context of an action pursuant to 42 U.S.C. §1981, a statute obviously dissimilar to ERISA §502, and one in which there is no provision for remedies. The Setser Court determined the remedy available within the context of §1981, and, therefore, is not dispositive of the issue before this court, and is not in conflict with the Sixth Circuit's interpretation of ERISA in this case.

In fact, each of the Courts in Crocker, Waldrop and Setser analogize to statutes other than ERISA evidencing further the dissimilarities in the opinions and reasoning of these cases when compared to the decision of the Court below. In sum, Petitioner's contention that these three cases represent a conflict with the decision of the Sixth Circuit in this case is unsupportable, as these cases are distinguishable as a matter of law.

CONCLUSION

Respondent prays that the Court deny Petitioner's Writ For Certiorari because the decision of the Court below is not in error, there is no conflict among the various Circuit Courts on the issue before this Court, the decision below is not inconsistent with this Court's previous opinions on the issue here, and this case presents no issue appropriate for the Court's review.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 28 1995
CLERK

(3)

NO. 94-2035

In The
Supreme Court of The United States
October Term 1994

JOSEPH S. GREGORI, M.D., AND JOSEPH S. GREGORI, M.D., INC., Individually and as employer and administrator of Pension Plan and Trust,

Petitioners,

v.

DIANE A. SCHWARTZ,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a novel question of federal law which forms the basis for a conflict among the Circuits and with respect to which the Sixth Circuit has departed from previous decisions of this Court; namely, whether a monetary award of back pay and front pay for violations of Section 510 of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1140 can properly be characterized as equitable relief so as to be available under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B)?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOSEPH S. GREGORI, M.D. AND JOSEPH S. GREGORI, M.D., INC., Individually and as employer and administrator of Pension Plan and Trust, Petitioners,
V.
DIANE A. SCHWARTZ, Respondent.

Petition For Writ Of Certiorari
To The United States Court
Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REASONS FOR GRANTING CERTIORARI

In her Brief in Opposition to the Petition for a Writ of Certiorari of Petitioners Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc. (hereinafter "Gregori"), Respondent, Diane A. Schwartz (hereinafter "Schwartz"), presents four arguments in support of her position that this Court should not grant a writ of certiorari in

the above-captioned matter. All four of Schwartz's arguments, however, are legally and logically flawed.

Indeed, in several instances Schwartz's arguments merely serve to highlight the potential confusion lower Court's will face in trying to reconcile the Sixth Circuit's decision in this case with the existing precedents of not only this Court, but those of other Circuit Courts of Appeal. The issue presented by this case is one that is ripe for consideration by this Court so as to eliminate that potential confusion and prevent any further divergences among the Circuit Courts of Appeals on the issue of whether back pay and front pay constitute equitable or legal relief in the context of a wrongful discharge or wrongful failure to hire.

I. THE CASES UPON WHICH SCHWARTZ RELIES FOR THE PROPOSITION THAT BACK PAY AND FRONT PAY AWARDS FOR VIOLATIONS ERISA § 510 ARE AVAILABLE PURSUANT TO ERISA § 502(a)(3)(B) DO NOT ACCURATELY REFLECT THE CURRENT STATE OF THE LAW.

In Section I of her Opposition Brief, Schwartz relies on Folz v. Marriott, 594 F.Supp. 1007 (W.D.Mo. 1984) and Bittner v. Sadoff and Rudoff Industries, 490 F.Supp. 534 (E.D.Wis. 1980) for the proposition that other Courts have recognized that back pay and front pay can be awarded for violations of ERISA § 510 pursuant to ERISA § 502(a)(3)(B). Neither of these decisions, however, represent the current state of the law and both have been rejected in subsequent decisions. Both Folz and Bittner were decided prior to this Court's pronouncements in Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993)

and Massachusetts Mutual Life Insurance Co. V. Russell, 473 U.S. 134 (1985), regarding the correct interpretation of the phrase "other equitable relief" as it is used in the context of ERISA.

In Allison v. Dugan, 737 F.Supp. 1043 (N.D.Ind. 1990), a plaintiff who sought to rely on Bittner was rebuked as follows:

> Additionally, Allison relies upon the case of Bittner v. Sadoff and Rudoy Industries, 490 F.Supp. 534 (E.D.Wis. 1980), in support of his claim for punitive damages. Allison ignores the fact that the holding in this case has clearly been superseded by the decision of the United States Supreme Court in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).
>
> While it does not appear that Allison's claims for compensatory and punitive damages or demand for jury trial was made for any improper purpose or in bad faith, it does appear that counsel for

> Allison neglected to make reasonable inquiry into the applicable law of this Circuit before making these claims for damages and jury demand.

Allison, 737 F.Supp. at 1050. In fact, the Allison Court then went on to impose sanctions on plaintiff's counsel pursuant to Fed.R.Civ.P. 11 for his baseless reliance on Bittner[1], noting that "an empty head but a pure heart is no defense" to sanctions under Rule 11. Allison, 737 F.Supp at 1051 quoting Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 932 (7th Cir. 1989). In light of this Court's decisions in Mertens and Russell Schwartz's reliance on Bittner is unsupportable.

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[1]Though the imposition of sanctions was overturned on appeal, Allison v. Dugan, 951 F.2d 828 (7th Cir. 1992), the fact that a Court would even consider imposing them reflects upon the weakness of the Bittner decision as a persuasive precedent.

Schwartz's reliance on Folz is likewise misplaced. The Court in Folz relied heavily on legislative history which stated that Congress intended "to provide the full range of legal and equitable remedies" under ERISA. Folz, 594 F.Supp. at 1015, citing S.Rep. No. 93-127, 93rd Cong. 2d. Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 4871. This Court in Russell, however, correctly noted that this committee report described a draft version of ERISA that specifically provided for legal relief, but that the bill ultimately passed did not contain the provision allowing for legal relief. Russell, 473 U.S. at 145-46 and n. 14.

The Tenth Circuit, which had at one time also erroneously relied upon this legislative history, recently

acknowledged its mistake, and held that these provisions do not support the contention that ERISA § 502(a)(3)(B) allows legal relief. Lafoy v. HMO Colorado, 988 F.2d 97, 100, n. 4 (10th Cir. 1993).

Schwartz's reliance on Folz and Bittner for the proposition that Courts have recognized that back pay and front pay can be awarded for violations of ERISA § 510 pursuant to ERISA § 502(a)(3)(B) is misplaced. Schwartz fails to recognize or address the effect that this Court's decisions in Mertens and Russell had on the reasoning used by the District Courts in Folz and Bittner. Schwartz's reliance on these decisions merely demonstrates the weakness of her arguments.

To date, no court other than the Sixth Circuit in the case sub judice, has applied this Court's holdings in Mertens, Russell and Chauffeurs, Teamsters and Helpers Union Local No. 391 v. Terry, 494 U.S. 558 (1990) to the issue of whether back pay and front pay can be awarded for violations of ERISA § 510 pursuant to ERISA § 502(a)(3)(B). It is imperative that this Court grant Gregori's Petition for a Writ of Certiorari in order to prevent further misapplication of outdated cases such as Folz and Bittner. Indeed, the District Court justified its award of back pay and front pay to Schwartz in part on its misplaced reliance on these cases.[2] Unless this Court addresses this issue, similar

[2]See page A67 of Gregori's Petition for a Writ of Certiorari.

misapplications of ERISA § 502(a)(3)(B), particularly in light of the Sixth Circuit's decision in this case, will inevitably continue to occur.

II. THE SIXTH CIRCUIT'S HOLDING IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISIONS.

In Section II of her Opposition Brief, Schwartz argues that Gregori misinterprets this Court's decision in Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) by distinguishing between the back pay awarded for uncompensated overtime and the back pay awarded for the employer's wrongful discharge of the plaintiff. It is Schwartz, however, who improperly concludes that the back pay related to the discriminatory discharge in Mitchell was awarded based on restitution.

It is not unimportant to note that the only mention Mitchell made of restitution was when it referred to "restitution of partial deficiencies in wages due for past work." Mitchell, 361 U.S. at 293. Notably absent from the portions of Mitchell which considered whether back pay for a wrongful discharge was available, is any mention of restitution.

Rather, Mitchell went on to consider whether such an award of back pay was within the Court's equitable jurisdiction. This Court ultimately concluded that the language of the Fair Labor Standards Act did not preclude the Court from awarding back pay for the discriminatory discharge. In reaching this conclusion, the Court stated the

"measure of reimbursement is compensatory only." Mitchell, 361 U.S. at 293.[3]

From the above discussion of Mitchell, it becomes clear that the Sixth Circuit's interpretation of Mitchell conflicts with this Court's holding in Mertens. Mertens, in direct contrast to Mitchell, held that ERISA *does* limit a Court's equitable jurisdiction to those remedies traditionally recognized as equitable. Mertens, 113 S.Ct. at 2068.

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[3]This Court immediately followed that pronouncement with the following language, which has been cited by Schwartz as evidence that this Court intended the back pay awarded in connection with the unlawful discharge to be restitutionary:

> Respondents cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services.

Mitchell, 361 U.S. at 293. This passage merely clarifies that the plaintiff was being compensated for the unlawful loss of his job, rather than work performed. As recognized by Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 747 (D.C.Cir. 1995), this type of compensatory relief is not restitutionary.

Because of this limitation, Mertens held that compensatory money damages are not available pursuant to ERISA § 502(a)(3)(B). Mertens 113 S.Ct. at 2068. This is, however, precisely how Mitchell described the award of back pay for a wrongful discharge. Thus, the interpretation of Mitchell adopted by the Sixth Circuit puts it in direct conflict with Mertens. Such a result must be avoided.

While it is true that this Court in Terry recognized that Mitchell is an example of a situation where back pay can be characterized at restitutionary, it does not follow, as the Sixth Circuit seems to believe, that Terry was referring to back pay for wrongful discharge. Rather, it makes more sense that this Court was referring to the back

pay it expressly referred to in Mitchell as restitutionary, i.e. back pay for undercompensated overtime.

III. THE PURPOSES OF ERISA § 510 CAN BE SATISFIED WITHOUT THE NEED FOR AWARDS OF BACK PAY AND FRONT PAY.

In section III of her Reply Brief, Schwartz contends that awards of back pay and front pay in connection with ERISA § 510 are appropriate remedies because the statute was intended to protect the employment relationship. While Gregori does not disagree with this basic proposition, Gregori contends that ERISA § 510 was designed to protect the employment relationship *only* because it gives rise to pension benefits. See West v. Butler, 621 F.2d 240 (6th Cir. 1980) and McGath v. Auto Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993). This is in contrast to other employment

discrimination statutes such as Title VII, which protect the employment relationship for its own sake.

Schwartz, in her Opposition Brief, fails to recognize this distinction. This distinction, however, is the basis for Congress' decision to provide different remedies in the various employment statutes. With respect to ERISA, Congress has determined that the employment relationship that gives rise to pension benefits can be adequately protected through the remedies provided by the statute, which do not include legal relief such as back pay and front pay.

As recognized by Terry, Congress, in enacting Title VII, expressly stated that back pay would be an available remedy. Terry, 494 U.S. at 572. Congress made no

such pronouncement in connection with ERISA. Indeed, after initially considering drafts of ERISA which provided for legal relief, Congress settled on a version that provided for only equitable relief. Russell, 473 U.S. at 145-46 and n. 14.

By expanding the scope of remedies intended by Congress, the Sixth Circuit has impermissibly broadened the statute beyond its intended purview. For this reason, this Court must grant Gregori's Petition for a Writ of Certiorari.

IV. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT THE DECISIONS OF THE EIGHTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS.

In Section IV of her Opposition Brief, Schwartz attempts to distinguish Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir.) amended en banc., 657

F.2d 962, cert. denied, 454 U.S. 1064 (1981), Waldrop v. Southern Company Services, Inc., 24 F.3d 152 (11th Cir. 1994) and Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C.Cir. 1995) on the grounds that they deal with statutes other than ERISA.

This distinction, however, does not affect the underlying analysis undertaken by those Courts regarding whether back pay in the context of a discriminatory discharge or failure to hire was restitution. That analysis must necessarily be the same regardless of what statute is being considered.

When the Courts in Setser, Waldrop and Crocker analyzed the various statutes in question, they were not doing so in order to determine whether back pay was restitutionary. Rather, they were

looking at the statutes under review to determine if back pay was an available remedy under such statutes.

In Setser, Waldrop and Crocker, the issue of whether back pay was an equitable or legal remedy was important because it determined whether a jury would be available. Thus, the courts first had to look at whether back pay could be awarded. Once the courts determined that back pay was an available remedy, the courts next looked to whether the back pay was legal or equitable. It was in this context that the Courts addressed the issue of whether the back pay constituted restitution.

With respect to this case, the analysis is essentially reversed. Here, this Court has already determined that pursuant to ERISA § 502(a)(3)(B), only

equitable relief is available. Thus, the critical issue in this case is whether back pay is equitable relief. As in Setser, Waldrop and Crocker, that analysis is done independent of the statute involved.

The Sixth Circuit's determination that the back pay and front pay awarded to Schwartz in connection with her unlawful termination was an equitable restitutionary award is clearly in direct conflict with the determination of the Setser, Waldrop and Crocker Courts that back pay in a wrongful discharge or failure to hire context constitutes legal, compensatory money damages.

CONCLUSION

For the foregoing reasons, as well as those reasons set forth in Gregori's Petition for Writ of Certiorari, a writ

of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 31, 1995.

Respectfully submitted,

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